SUPREME COURT, U. S.

FILED

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IN THE

Supreme Court of the United States

October Term, 1973.

No. 73-1134

PBW STOCK EXCHANGE, INC.,

EQUITY SERVICES, INC.; GUARDIAN ADVISERS, INC.; PENN MUTUAL SECURITIES CORPORATION,

CONNECTICUT NUTMEG SECURITIES, INC.,

and

ROBERT I. BERDON as Treasurer of the State of Connecticut, and President of CONNECTICUT NUTMEG SECURITIES, INC.,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

PETITION OF PBW STOCK EXCHANGE, INC., EQUITY SERVICES, INC., GUARDIAN ADVISERS, INC., PENN MUTUAL SECURITIES CORPORATION, CONNECTICUT NUTMEG SECURITIES, INC., AND ROBERT I. BERDON AS TREASURER OF THE STATE OF CONNECTICUT, AND PRESIDENT OF CONNECTICUT NUTMEG SECURITIES, INC., FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

(Names of Counsel appear on back of front cover)

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-9211

FRANKLIN POUL,
JUDITH R. COHN,
CARL W. SCHNEIDER,
Of Counsel:
WOLF, BLOCK, SCHORR AND SOLIS-COHEN,
Philadelphia, Pennsylvania, 19102
Attorneys for Petitioner, PBW Stock Exchange, Inc.

DANIEL J. MCCAULEY, JR.,
BLANK, ROME, KLAUS & COMISKY,
Philadelphia, Pennsylvania, 19103

MILTON V. FREEMAN,
JEFFREY D. BAUMAN,
ARNOLD & PORTER,
Washington, D. C. 20036
Attorneys for Petitioners, Equity Services, Inc.; Guardian Advisers, Inc.; Penn Mutual Securities Corporation.

GEORGE D. REYCRAFT,
THOMAS A. RUSSO,
HAVEN C. ROOSEVELT,
Of Counsel:
CADWALADER, WICKERSHAM & TAFT,
New York, New York, 10005
Attorneys for Petitioner, Connecticut Nutmeg Securities, Inc.

ROBERT K. KILLIAN,
Attorney General,
BERNARD F. MCGOVERN, JR.,
Assistant Attorney General,
State of Connecticut,
Attorneys for Petitioner, Treasurer of the State of Connecticut, and President of Connecticut Nutmeg Securities, Inc.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973.

No. .

PBW STOCK EXCHANGE, INC.,

EQUITY SERVICES, INC.; GUARDIAN ADVISERS, INC.; PENN MUTUAL SECURITIES CORPORATION,

CONNECTICUT NUTMEG SECURITIES, INC.,

ROBERT I. BERDON AS TREASURER OF THE STATE OF CONNECTICUT, AND PRESIDENT OF CONNECTICUT NUTMEG SECURITIES, INC.,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

PBW Stock Exchange, Inc., Equity Services, Inc., Guardian Advisors, Inc., Penn Mutual Securities Corporation, Connecticut Nutmeg Securities, Inc., and the Treasurer of the State of Connecticut, petitioners, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on September 28, 1973, dismissing the above-entitled cases for lack of jurisdiction, the Honorable Arlin M. Adams dissenting.

OPINIONS BELOW.

The only opinions relating to this petition for a writ of certiorari are the opinions of the Court of Appeals for the Third Circuit (the majority opinion and the dissent of Judge Adams) which are reported at 485 F. 2d 718. Copies are attached to this petition as Appendix A.[1]

JURISDICTION.

The judgment of the Court of Appeals dismissing petitions for review of Securities Exchange Act Rule 19b-2 was entered on September 28, 1973. A timely petition for rehearing by the Court En Banc was denied on October 31, 1973. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1) (1970).

QUESTION PRESENTED.

Can the Securities and Exchange Commission divest the Court of Appeals of jurisdiction to review its directive requiring a registered national securities exchange to alter its membership rules so as to expel and exclude a major part of its membership by calling its action a "rule" rather than an "order"?

STATUTES INVOLVED.

The statutes involved are sections 19(b) and 25(a) of the Securities Exchange Act of 1934, 15 U. S. C. §§ 78s(b), 78y(a); and section 10 of the Administrative Procedure Act, 5 U. S. C. §§ 702-04. Copies of these statutory provisions are attached to this petition as Appendix C.

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1. Securities Exchange Act Rule 19b-2, 17 C.F.R. § 240.19b-2 (1973), was the subject of the petition for review in the Court of Appeals. Respondent issued a "Release" promulgating it which is included in the record in the Court of Appeals. Because of the length of this Release and because it is not an opinion on the question of jurisdiction of the Court of Appeals, the issue for which a writ of certiorari is sought, it has not been reproduced in the Appendix, but a certified copy will be sent to this Court from the Court of Appeals. A copy of Rule 19b-2 is attached to this Petition as Appendix B.

STATEMENT OF THE CASE.

Petitioner PBW Stock Exchange, Inc. (P. B. W.) and several of its institutional members [2] sought judicial review of Securities Exchange Act Rule 19b-2, 17 CFR § 240.19b-2, in the Court of Appeals pursuant to section 25(a) of the Securities Exchange Act of 1934 (Exchange Act) and section 10 of the Administrative Procedure Act. Their petitions were dismissed for lack of jurisdiction by the Court of Appeals for the Third Circuit, Judge Adams dissenting.

P. B. W. is one of twelve national securities exchanges registered under section 6 of the Exchange Act. P. B. W. is commonly referred to as a regional exchange in contrast with the New York Stock Exchange (NYSE) and the American Stock Exchange (AMEX), which are the primary exchanges. Approximately two percent of all exchange transactions are executed on P. B. W.

The primary exchanges have completely barred affiliates of institutions from membership. Most regional exchanges also have rules either barring such affiliates or restricting the amount of business they can do for affiliates. P. B. W.'s rules impose no restrictions either on the institutional nature of the parent or the amount of business done for it.

P. B. W. has actively solicited the membership of entities which serve primarily as brokers for affiliated financial institutions, such as insurance companies, mutual funds, pension funds and governmental entities. It has 38 such members, including the other petitioners, commonly referred to as "institutional members" which account for

2. Petitioners Equity Services, Inc., Guardian Advisors, Inc. and Penn Mutual Securities, Inc. are broker affiliates of insurance companies; Connecticut Nutmeg Securities, Inc. is a broker organized to execute the portfolio of the pension funds of the State of Connecticut, and the Treasurer of the State of Connecticut is the President of Connecticut Nutmeg.

35% of the trading volume on its exchange and 43% of its revenues. It depends upon these members to support itself as a viable exchange in competition with the NYSE and AMEX. Institutional members save millions of dollars in brokerage commissions for their affiliates, and the beneficiaries of these affiliates, through membership on an exchange.

On January 16, 1973 respondent promulgated Rule 19b-2 by means of Release No. 9950 titled "Adoption of Rule 19b-2 Under the Securities Exchange Act of 1934 Governing the Utilization of Exchange Membership for Public Purposes" (Release).

Rule 19b-2 directs P. B. W. to alter its own exchange rules to exclude and expel any member which does not have as the principal purpose of its membership the conduct of a public securities business. A member is deemed to satisfy this principal purpose test only if it executes eighty percent of its exchange business with or for unaffiliated persons (or in certain specified transactions not normally applicable to institutional members). Thus, Rule 19b-2 requires P. B. W. to expel and exclude from membership all institutional members, including the other petitioners—unless they are willing and able to make an immediate commitment to transform themselves into public brokers pursuant to Rule 19b-2(c).

Although respondent purported to issue Rule 19b-2 under numerous rulemaking provisions of the Exchange Act,[3] section 19(b) is the only section in the Exchange Act granting respondent any power to compel an exchange to alter its rules. It provides that before compelling an exchange to change its rules respondent must first request voluntary action and then hold a hearing if the exchange refuses to modify its rules.

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3. Sections 23(a), 2, 6, 11, 17 and 19, 15 U. S. C. § 78w(a), 78b, 78f, 78k, 78q and 78s. (Release, p. 1.)

Although Rule 19b-2 is addressed to all twelve registered national securities exchanges, P. B. W. is the only exchange which actively solicited institutional members since 1968, which depends upon them for a substantial portion of its business and which fought vigorously against the adoption of Rule 19b-2 in order to retain them. The primary exchanges have urged their exclusion from all exchanges because insofar as institutional affiliates may join an exchange, the affiliated institutions avoid paying commissions to broker members of the primary exchanges.

The parameters of the administrative proceedings related to the adoption of Rule 19b-2 are a subject of dispute between petitioners and respondent. Respondent states in its Release that Rule 19b-2 is based on administrative and legislative hearings and studies since 1968 concerning market structure and market operations (Release, p. 10).[4]

The first official objection to institutional membership actually came on February 2, 1972 in the "Institutional Membership" section of respondent's "Statement on the Future Structure of the Securities Markets" which indicated an intent to use section 19(b) to limit exchange membership to those "whose primary purpose is to serve the public as brokers or market makers." (p. 44, 48).

On February 15, 1972 respondent requested the exchanges to modify their rules, *inter alia*, to restrict membership to firms doing the prominent portion of their business for unaffiliated customers, suggesting 80% as predominant. Only P. B. W. expressed complete disagreement with the restriction and unwillingness to adopt any such rule.

On April 20, 1972 respondent presented the same position in the SEC White Paper on Institutional Membership

4. It filed with the Court below a 90-page designation of the record for Rule 19b-2 citing administrative and legislative studies and hearings dating back as far as 1936.

submitted to a Senate subcommittee on Securities of the Committee on Banking, Housing and Urban Affairs, acknowledging that the only roadblock to the adoption of an exclusionary rule was P. B. W. (p. 30).

On May 26, 1972 respondent formally requested, pursuant to section 19(b) of the Exchange Act, adoption of a "Proposed Exchange Rule on Institutional Membership", virtually identical to Rule 19b-2. After P. B. W.'s refusal, respondent published proposed Rule 19b-2 on August 3, 1972, but without express reference to institutional membership. Exchange Act Release No. 9716.

On August 25, 1972, P. B. W. requested an evidentiary hearing. Respondent denied the request. After written comments were received by respondent and several days of oral argument in November (including objections and presentations by each of the petitioners), respondent promulgated Rule 19b-2 on January 16, 1973.

On February 8, 1973 petitioner PBW Stock Exchange, Inc. filed a petition for review of Rule 19b-2 in the Court of Appeals for the Third Circuit (No. 73-1116). Petitioners Equity Services, Inc., Guardian Advisors, Inc. and Penn Mutual Securities, Inc. filed a Petition for Review on February 21, 1973 (No. 73-1165) and Connecticut Nutmeg Securities and the Treasurer of the State of Connecticut filed theirs on March 6 and 7, 1973 (Nos. 73-1266-67).[5]

Petitioners challenge the validity of Rule 19b-2 on both substantive and procedural grounds. They contend that Rule 19b-2 is beyond respondent's enumerated powers over exchange rules specified in section 19(b), unrelated to the other Exchange Act powers invoked by respondent, evidentially unsupported, and impermissibly inconsistent with the

5. Connecticut Nutmeg Securities, Inc. filed the petition in the United States Court of Appeals for the D. C. Circuit but was transferred to the Third Circuit on April 2, 1973 on the motion of respondent.

antitrust laws. They also contend that they were entitled to an evidentiary hearing as a matter of Constitutional due process, as well as by the express terms of section 19(b).

The Department of Justice supported the position of petitioners by brief *amicus*, as did also the States of Pennsylvania, Oregon, Ohio and Kansas, and the American Insurance Association.

On March 7, 1973 petitioner obtained a stay of Rule 19b-2. The stay was modified on March 19, 1973. On March 26, 1973 respondent filed a motion to dismiss the petition for lack of jurisdiction and petitioners replied with briefs in opposition.

On September 28, 1973 after briefs on the merits and oral argument were presented, the Court dismissed the petitions for review for lack of jurisdiction, Judge Adams vigorously dissenting in an extensive opinion.

REASONS FOR GRANTING THE WRIT.

1. The Court below has created a new standard for judicial review of administrative action which permits an administrative agency to control the reviewability of its action and the forum for that review.

(a) The petitions for review of Rule 19b-2 were dismissed because section 25(a) of the Exchange Act provides for review of "orders" and Rule 19b-2 was promulgated as a "rule". The Court below held that section 19(b) of the Exchange Act gives respondent discretion to compel a registered exchange to alter its rules by "rules or regulations or by order", and that if it issues its directive by "rule" it may avoid the review provisions of section 25(a) regardless of the substantive nature or impact of its action. Assuming that the references to "rules", "regulations" and "orders" in section 19(b) gives respondent discretion as to the choice between rulemaking or adjudicatory proceedings (which we dispute in context), this decision elevates that discretion into power to determine when, where and how its action may be subject to judicial review.

(b) The Court below concedes that if after using rulemaking procedures to formulate Rule 19b-2, respondent had "ordered" it into effect it would be reviewable pursuant to section 25(a). Thus identical actions may be reviewable or not reviewable depending upon the rhetoric employed by an agency promulgation. If this is the case, an agency may control the jurisdiction of the Court of Appeals by the label attached to its action.

2. The decision of the Court below is in direct conflict with the decisions of this Court establishing standards for review of administrative action.

(a) In *Columbia Broadcasting System, Inc. v. United States*, 316 U. S. 407 (1942); *United States v. Storer Broadcasting Co.*, 351 U. S. 192 (1956) and *Frozen Food Express v. United States*, 351 U. S. 40 (1956), this Court held that rules and regulations promulgated through rulemaking rather than after an adjudication were within the scope of statutes providing for review of an "order". This Court rejected arguments made by administrative agencies based on their own characterization and held that the *substantive impact*, not the label attached to administrative action, determined whether it was a reviewable "order".

There is no analytical difference between Rule 19b-2 and the rules and regulations held reviewable in *CBS*, *Storer* and *Frozen Food*. As we have shown Rule 19b-2 in spite of the generality of its language was aimed at institutional membership and at P. B. W.—the only exchange unqualifiedly committed thereto. But even if the "broad regulation" (of 12 exchanges) is accepted at face value, the plain effect is to prevent P. B. W. from retaining a critical part of its membership and to deprive institutions, including the other petitioners, of the chance to save millions of dollars. Thus, it has at least as direct and substantive an impact as the chain broadcasting regulations in *CBS*, the licensing requirements of *Storer* and the exemption in *Frozen Food*. The statutes involved in each of those cases provided a specific procedure for the review of "orders" as does section 25(a) of the Exchange Act.

The Court below distinguished *CBS*, *Storer* and *Frozen Food* on the ground that there it was an "order" which put into effect the *rule* which was being challenged. But this is a perfectly fortuitous turn of phrase. Whether the process of adopting a rule should itself be called an "order" for purposes of review cannot depend on whether the agency says "We order," "We adopt," or "We declare effective."

There is nothing in this Court's opinions or in the underlying statutes to support this trivialization of the *CBS, Storer,* and *Frozen Food* cases. This Court manifestly did not intend to give administrative agencies the option to decide review by form of incantation.

(b) The Court below extended *American Federation of Labor v. National Labor Relations Board*, 308 U. S. 401 (1940) in direct conflict with *CBS, Storer* and *Frozen Food.* In *AFL v. NLRB*, this Court held that a board certification of a union as bargaining representative under section 9 of the NLRA was not a "final order" reviewable under section 10(f). This Court expressly relied upon the very nature of section 10 which related to unfair labor practice orders only and was enacted with the heading "Prevention of Unfair Labor Practices". There was no suggestion that the NLRB could christen the same substantive action with different labels and thus determine the jurisdiction of any federal court.

(c) The legislative history relied upon by the Court below does not distinguish this case from *CBS, Storer* and *Frozen Food* and its application is in clear conflict with the decision of this Court in *Abbott Laboratories v. Gardner,* 387 U. S. 134 (1967). As demonstrated by Judge Adams in the dissenting opinion, the bits and pieces of legislative history cited in the majority opinion do not evidence the requisite legislative intent to deprive the Court of Appeals of jurisdiction to review respondent's rules or regulations under section 19(b) or to give respondent the option to decide the reviewability of its actions. The comments cited in the majority opinion related to the House bill which referred only to rules or regulations, or the Senate bill which referred only to orders, not to the final version of

section 19(b) which combines the two. The legislative history of section 25(a) quoted in the majority opinion (comments of Senator Barkley) related to possible appeals by persons who (unlike petitioners) were *not parties* to the proceeding. Furthermore, all of the legislative history of the Exchange Act relating to judicial review referred to whether or not there would be any at all. Since the majority does not deny a right to review in the district court (implying strongly that there *is* one, and chastising petitioners for arguing the issue) legislative comments about precluding review altogether are a strange basis for shifting initial review to the district court.

3. The decision of the Court below is in conflict with decisions of the Court of Appeals for the District of Columbia.

The District of Columbia Circuit has consistently held that rules and regulations with substantive impact are reviewable under statutes which use the word "order", whether the agency promulgates them in the form of an order or not. *Deutsche Lufthansa Aktiengesellschaft v. Civil Aeronautics Board*, 479 F. 2d 912, 915 (D. C. Cir. 1973); *City of Chicago, Illinois v. Federal Power Commission*, 458 F. 2d 731, 738 (D. C. Cir. 1971), *cert. denied* 405 U. S. 1074 (1972); *Medical Commission for Human Rights v. Securities and Exchange Commission*, 432 F. 2d 659, 665 (D. C. Cir. 1970), vacated as moot, 404 U. S. 403 (1972); *Philadelphia Company v. Securities and Exchange Commission*, 164 F. 2d 889 (D. C. Cir. 1947), *cert. denied* 333 U. S. 828, 68 S. Ct. 452 (1948).

Two cases in that circuit involved respondent.

Medical Commission for Human Rights v. Securities and Exchange Commission, 432 F. 2d 659 (D. C. Cir. 1970) vacated as moot, 404 U. S. 403 (1972), held that the action

of respondent in refusing to require a proposal included in a proxy statement was reviewable under section 25(a) of the Exchange Act although it was not called an "order". The decision of that court with respect to the legislative history of the Exchange Act is completely opposite from that of the Court below.

Philadelphia Company v. Securities and Exchange Commission, 164 F. 2d 889 (D. C. Cir. 1947) *cert. denied*, 333 U. S. 828 (1948), held that action which was not called an order was reviewable under section 24(a) of the Public Utility Holding Company Act which is identical to section 25(a) of the Exchange Act.

4. This case involves important questions as to the interpretation of two federal statutes—the Administrative Procedure Act and the Exchange Act—which should be reviewed by this Court under its supervisory powers.

(a) Under the decision of the Court below section 25(a) of the Exchange Act (as well as other identical jurisdictional statutes and 28 U. S. C. § 2342) is limited to actions which respondent chooses to label orders. Review of all other administrative action by respondent is left in confusion with the implication it belongs in the district court. This will cause undue delay and uncertainty in obtaining judicial review which is inconsistent with the procedure contemplated by section 25(a) of the Exchange Act (and other statutes which provide for direct review of administrative action in a Court of Appeals). Respondent itself has in another context, when review was sought in the district court, argued that section 25(a) is the exclusive basis for review of its action. *Independent Broker-Dealers' Trade Association v. Securities and Exchange Commission*, 442 F. 2d 132, 142 (D. C. Cir. 1971) *cert. denied*, 404 U. S.

828 (1972). Unless the matter is resolved by this Court petitioners seeking review of respondent's decisions will be unable to determine the proper forum, which may vary from circuit to circuit while respondent's position varies from case to case.

(b) The Court below assumed that judicial review of Rule 19b-2 is available presumedly because of the Administrative Procedure Act and the decision of this Court in *Abbott Laboratories v. Gardner*, 387 U. S. 134 (1967), but it ignored section 10(b) of the Administrative Procedure Act, 5 U.S.C. § 703 which provides that where action is reviewable "The form of proceeding for judicial review is the special statutory proceeding relevant to the subject matter *in a court specified by statute* or, in the absence or inadequacy thereof, any applicable form of legal action. . . ." (Emphasis added.) In view of the decision below this case squarely poses the question of the relationship between the quoted provision of the Administrative Procedure Act and statutes like section 25(a) of the Exchange Act, requiring a resolution by this Court as to the proper forum of initial review.

5. Rule 19b-2 involves issues of critical importance to the entire securities industry. It requires P. B. W. to drastically alter its business. It prevents the other petitioners and the amici, and other mutual insurance companies, states, pension funds and the like from saving for millions of beneficiaries the amounts that have to be paid to NYSE and AMEX brokers. Rule 19b-2 has been attacked not only by petitioner and its members but by the Department of Justice and congressional subcommittees. The issues presented were ripe for decision by the Court of Appeals and no purpose will be served by the delay involved in requiring petitioner to proceed in the district court and

back to the Court of Appeals which has already heard all the arguments on the merits.

Respectfully submitted,

FRANKLIN POUL,
JUDITH R. COHN,
CARL W. SCHNEIDER,
Of Counsel:
WOLF, BLOCK, SCHORR AND SOLIS-COHEN,
Philadelphia, Pennsylvania 19102,
Attorneys for Petitioner, PBW Stock Exchange, Inc.

DANIEL J. MCCAULEY, JR.,
BLANK, ROME, KLAUS & COMISKY,
Philadelphia, Pennsylvania 19103,
MILTON V. FREEMAN,
JEFFREY D. BAUMAN,
ARNOLD & PORTER,
Washington, D. C. 20036,
Attorneys for Petitioners, Equity Services, Inc.; Guardian Advisers, Inc.; Penn Mutual Securities Corporation.

GEORGE D. REYCRAFT,
THOMAS A. RUSSO,
HAVEN C. ROOSEVELT,
Of Counsel:
CADWALADER, WICKERSHAM & TAFT,
New York, New York 10005
Attorneys for Petitioner, Connecticut Nutmeg Securities, Inc.

ROBERT K. KILLIAN,
Attorney General,
BERNARD F. MCGOVERN, JR.,
Assistant Atty. Gen.,
State of Connecticut,
Attorneys for Petitioner, Treasurer of the State of Connecticut, and President of Connecticut Nutmeg Securities, Inc.

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 73-1116

PBW STOCK EXCHANGE, INC.,
Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent,

No. 73-1165

EQUITY SERVICES, INC.; GUARDIAN ADVISERS, INC.; PENN MUTUAL SECURITIES CORPORATION,
Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

No. 73-1266

CONNECTICUT NUTMEG SECURITIES, INC.,
Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

No. 73-1267

ROBERT I. BERDON AS TREASURER OF THE STATE OF CONNECTICUT, and PRESIDENT OF CONNECTICUT NUTMEG SECURITIES, INC.,
Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

ON PETITIONS FOR REVIEW OF AN ORDER OF THE SECURITIES AND EXCHANGE COMMISSION

Argued June 7, 1973

Before SEITZ, *Chief Judge*, STALEY and ADAMS, *Circuit Judges*.

Franklin Poul
Judith R. Cohn
Carl W. Schneider

Of Counsel
Wolf, Block, Schorr and Solis-Cohen
Philadelphia, Pennsylvania 19102
Attorneys for Petitioner, PBW Stock Exchange, Inc., No. 73-1116

Daniel J. McCauley, Jr.
Blank, Rome, Klaus & Comisky
Philadelphia, Pennsylvania 19103

Milton V. Freeman
Jeffrey D. Bauman
Arnold & Porter
Washington, D.C. 20036
Attorneys for Petitioners in No. 73-1165

Cadwalader, Wickersham & Taft
Attorneys for Petitioner in No. 73-1266

Robert K. Killian, Attorney General
Bernard F. McGovern, Jr., Assistant Atty Gen.
State of Connecticut
Attorneys for Petitioner in No. 73-1267

Walter P. North, Acting General Counsel
David Ferber, Solicitor
Harvey L. Pitt, Special Counsel

David J. Romanski
Martin S. Berglas
Charles R. Manzoni, Jr.

Attorneys for Respondent, Securities and Exchange Commission in No. 73-1116, No. 73-1165, No. 73-1266 and No. 73-1267

OPINION OF THE COURT

(Filed September 28, 1973)

SEITZ, *Chief Judge*.

Petitioners here appeal directly from the promulgation of Rule 19b-2 [1] by the Securities and Exchange Commission, effective January 16, 1973. Petitioners invoke the jurisdiction of this court under § 25(a) of the Securities Exchange Act of 1934 [2] and § 10 of the Administrative Procedure Act. 15 U.S.C. § 78y(a); 5 U.S.C. §§ 702-04 (1971). The rule was not promulgated by an order of the Commission.

Rule 19b-2 was the product of many different hearings before, and studies by, the Commission. It is premised upon the basic theory that a condition attaching to membership on a public exchange is a willingness to serve the in-

1. 17 C.F.R. § 240.19b-2 (1973).

2. Hereinafter cited as Exchange Act.

vesting public. Therefore, the rule conditions future membership of both present and potential member brokerage firms upon a manifestation of such willingness. For purposes of this determination, the rule establishes a rebuttable presumption that any brokerage company is serving the public if at least 80% of its business volume is transacted for "nonaffiliated persons." Procedurally, the exchanges are required to adopt the rule as part of their individual exchange rules and by-laws.

A three-year grace period has been built into the rule. To take advantage of it, however, those currently not in compliance with the provisions of the rule must immediately adopt and begin putting into effect a plan designed to bring them into compliance within the three-year period. Each individual exchange is charged with ensuring the adoption and effectuation of a plan by its noncomplying members or itself be subject to proceedings before the Commission. 17 C.F.R. § 240.19b-2(d) (1973).

Because the rule requires the regulated public exchanges to supplement or alter their rules to bring themselves into conformance with its terms, it first was presented to the national exchanges by letter. This was pursuant to procedures mandated under § 19(b). However, in seeking authority to promulgate the substantive portions of this rule, the Commission relied upon §§ 2, 6, 11, 17 and 23(a), in addition to § 19(b). 15 U.S.C. §§ 78b, f, k, q, s(b) and w(a) (1971). When the exchanges, for various reasons, refused to adopt the rule voluntarily, the Commission held a rule-making proceeding under § 4 of the APA. 5 U.S.C. § 553 (1971). After the hearing, the rule was modified and adopted in its present form.

The rule applies to all members of all exchanges. However, the initial impact of the rule will be borne primarily by current institutional members of the various exchanges. Consequently, the rule has become known as the "institutional membership" rule. Collaterally, those exchanges which have noncomplying institutional members seemingly

will be affected in the same proportion to which they have allowed such membership. On the PBW Stock Exchange, forty-three per cent of the trading volume is accounted for by institutional members which presently are not in compliance with the rule. This appears to be the high. Others, like the New York Stock Exchange (NYSE), which has not allowed institutional membership, will feel the initial impact of the rule much less.

The future impact of the rule will not be so limited. Those exchanges which have not permitted institutions to buy memberships—such as the NYSE—will be forced to allow them to do so if the brokerage affiliate of an institution complies with the rule's standards. Thus, while certain exchanges may be prevented from dealing with those whose membership they would otherwise seek, other exchanges will be forced to deal with those they have sought to exclude in the past.

Along with the four named petitioners in this action, numerous *amici* have filed briefs for the information of the court, including the Antitrust Division of the Department of Justice. All challenge the provisions of the rule. The three preponderant bases of attack are: (1) the hearing procedure used here did not comport with that required by both § 19(b) of the Exchange Act and §§ 4, 7, and 8 of the APA [15 U.S.C. § 78s(b); 5 U.S.C. §§ 553, 556, & 557]; (2) the SEC lacked statutory authority to promulgate this rule; and (3) the SEC did not adequately attempt to reconcile the antitrust implications of the rule with the antitrust laws. A fourth underlying theme of these briefs is that the Commission's definition of "investing public" is arbitrary. Petitioners and the *amici* claim it fails to recognize that many institutional investors—such as mutual funds, mutual insurance funds, and state welfare and pension funds—are actually serving a broad spectrum of the investing public even though their brokerage affiliates may only execute the parent's transactions.

Although the SEC vigorously defends its rule on the merits, it has also interposed a motion to dismiss this ap-

peal for lack of jurisdiction. We turn to the disposition of the motion.

I. The Problem in the Context of the Statute.

Petitioners predicate this appeal upon both § 25(a) of the Exchange Act and § 10 of the APA. We note preliminarily that § 10 contains no independent grant of appellate jurisdiction to the court of appeals. Rather, it merely amplifies any jurisdictional grant to this court contained in the substance of the Exchange Act. Therefore, our examination must focus upon the terms of § 25(a). To provide perspective on the nature of the problem posed by this motion, and to provide a basis for our examination of the terms of § 25(a), however, it is essential to first examine the provisions of § 19(b).

Section 19(b) provides procedures for both voluntary and compelled adoption of Commission recommendations in specified regulatory areas. If the Commission deems a recommendation in any of these areas to be of sufficient import to warrant formal adoption by an exchange, it must send a letter to the exchange requesting it to make voluntarily the recommended alteration in its rules or by-laws. Should the exchange accede, no formal action by the Commission is required. The Commission's recommendation becomes binding upon members of that exchange because the exchange itself had adopted the rule. Once adopted, the exchange must enforce the rule or face possible disciplinary action by the Commission under § 19(a) of the Act.

Should the exchange refuse to comply with the request of the Commission to adopt the recommendation, the statute provides:

> The Commission is further authorized, if after making appropriate request in writing to a national securities exchange that such exchange effect on its behalf specified changes in its rules and practices, and after appropriate notice and opportunity for hearing, the

> Commission determines that such exchange has not made the changes so requested and that such changes are necessary or appropriate for the protection of investors or to insure fair dealing in securities traded in upon such exchange or to insure fair administration of such exchange, by rules or regulations or by order to alter or supplement the rules of such exchange. . . .

15 U.S.C. § 78s(b).

In the instant case, the Commission considered the proposal sufficiently important to direct it to all the registered securities exchanges. Various exchanges refused to comply with the Commission's rule, all for different reasons. After this refusal to comply, the statute vested in the Commission the option to effect the recommendation either by proceeding in a legislative manner—promulgation of a rule, or in an adjudicatory manner—issuance of an order. Here, the Commission chose to promulgate a rule.

The crux of the problem posed by this procedural discretion vested in the Commission under § 19(b) lies in the terms of the statutory review powers granted this court under § 25(a) of the Exchange Act.[3] Although the SEC has the option to proceed either by rule or regulation or by order under § 19(b), § 25 is not similarly broad in its grant of review jurisdiction to this court. Rather, § 25(a) allows review here only when an order has been entered by the Commission. Neither any section of the Exchange Act nor of the APA vests jurisdiction in this court to review on direct appeal from the SEC rules or regulations which it has promulgated.

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3. We note that petitioners, in their brief opposing the SEC's motion to dismiss, attempt to equate the question of whether they can obtain judicial review of this rule with the question of whether jurisdiction lies in this court to review this rule under § 25(a). We reject this attempt to unnecessarily obfuscate the issue of the availability of direct appellate review of Commission rules and regulations. We emphasize that in this opinion we are dealing only with this latter question. The availability of other types of review, particularly in the district court, is governed by § 10 of the APA and provisions of Title 28. *See* Abbott Laboratories v. Gardner, 387 U.S. 134 (1967); Leedom v. Kyne, 358 U.S. 184 (1958).

We wish nothing stated in this opinion as to the availability of relief in this court under § 25(a) to reflect negatively on the question of whether judicial review is otherwise available in another forum.

Despite this seeming statutory preclusion of our entertaining this appeal, petitioners steadfastly contend we have jurisdiction over this appeal. In their attempt to avoid the lack of a jurisdictional grant under the statute for direct appellate review of Commission rules, petitioners seek to show Rule 19b-2 is an order for purposes of the statute: (1) because of its substantive effect upon the business relationships between PBW and its members; and/or (2) because it was primarily aimed against one exchange, the PBW. On the former point, petitioners contend the decision of the Supreme Court in *Columbia Broadcasting System v. United States*, 316 U.S. 407 (1942), and its progeny are dispositive.

To deal with these contentions, we must first examine the structure and underlying legislative history of the Exchange Act, bearing in mind the admonition of the Supreme Court that:

> We must look . . . to the language of the statute, read in the light of its purposes and its legislative history, to ascertain whether the order for which review in court is provided is contrasted with forms of administrative action differently described as a purposeful means of excluding them from the review provisions.

AF of L v. NLRB, 308 U.S. 401 (1940).[4] After we have completed our examination of these elements, we will turn and consider the petitioners' contentions seriatim.

II. The Structure of the Exchange Act.

The Exchange Act was carefully structured to give the regulatory commission which it established powers sufficiently broad that it could effectively oversee the securities industry. The main thrust of the operative provisions of the Act was toward regulation of the nation's stock exchanges and trading thereon. The Act was passed

4. *Cf.* Schwab v. Quesada, 284 F.2d 140 (3d Cir. 1960).

against the backdrop of the catastrophic financial reverses suffered by this country in the period 1929-33. It was designed to supplement the initial efforts to protect investors manifested in the Securities Act of 1933 [5] and proscribed certain practices which had been regarded as major causes of those reverses in the securities markets. Additionally, it was left sufficiently open-ended that the regulatory agency which it established would have the power to deal with new and as yet unthought of schemes to defraud the investing public and manipulate the securities markets.

Procedurally, the Act is tailored and specific, dictating how functions delegated the Commission shall be handled. Some subsections prescribe an adjudicatory hearing with final issuance of an order; other sections mandate a rule-making proceeding with final promulgation of either a rule or regulation. In only six subsections of the entire Act is the Commission given the option to proceed either by order or by rule or regulation. Section 19(b) is one of those subsections.[6]

Comparison of §§ 19(a) and (b) illustrates this careful tailoring and delegation of procedural power. Section 19(a) is the subsection which provides, inter alia, for the disciplining of exchanges which do not comply with, or do not enforce, either the statute or the rules and regulations promulgated thereunder. 15 U.S.C. § 78s(a)(1). In exercising its power to suspend or withdraw the registration of an exchange, the statute specifies that the Commission shall proceed only by order. Thus, exercise by the Commission of the power vested in it by § 19(a)(1) would be immediately reviewable in this court under § 25(a). However, § (b)—which contains no grant of enforcement power against an exchange—provides that the Commission can proceed either by rule or regulation or by order. Further,

5. 15 U.S.C. § 77a, et seq. (1971).

6. The other five subsections are: 15 U.S.C. §§ 78d-1; 78l(g)(3) & (h); 78m(d)(5); 78o(a)(2) (1971). Parenthetically, it should be noted that the remaining sections under which the Commission purported to act do not give it the power to proceed otherwise than by rule or regulation.

it can proceed by either device even as to only one exchange under the terms of the subsection.

It is against this background that the grant of jurisdiction in § 25(a) must be examined. As with most sections of the Act, it is specific in the type of Commission action over which it allows direct appellate review in the court of appeals: it grants this court only the power to directly review orders of the Commission. Was the exclusion of rules or regulations promulgated by the Commission a deliberate omission? The answer is found in a review of the legislative history of the Act.

III. The Legislative History of the Exchange Act.

Examination of the Congressional history reveals that the omission of rules or regulations from the terms of § 25(a) was no mere oversight on the part of Congress. Rather, it was part of their specific intendment in drafting this legislation. This is most clearly revealed in the House floor debates on H.R. 9323 [73d Cong., 2d Sess.], the bill which eventually became the Securities Exchange Act of 1934.

Although § 19(b) was then numbered § 18(b), the procedural portion of the subsection was practically identical to its current form. The one difference of any notice is that the section at that point specified that the Commission would carry out its duties under § 19(b) only by rule or regulation.

Particularly relevant to our inquiry are the floor debates surrounding the proposed amendment of Rep. Fish of New York to delete the phrase "by rules or regulations" and substitute in the phrase "by order." Rep. Fish stated the purpose of his amendment was to "permit recourse to the courts by the exchange [affected by Commission action], whereas under 'rules or regulations,' the . . . Commission can do about anything it wants to the exchange and its members . . . without the exchange having any

recourse whatever to the courts." 78 Cong. Rec. 8087 (5/4/34).

A supporter of the Fish amendment, Rep. Wadsworth, in seeking support for the amendment, clearly defined the purpose of the amendment:

> [U]nder this section [as presently drafted], there is no recourse to the court. The final regulation of the Commission cannot be appealed from, and the amendment offered by the gentleman from New York [Mr. Fish] is merely for the purpose of allowing an exchange, in case of an extreme ruling which threatens to injure its legitimate business and the business of buying and selling securities all over the country, the right to appeal.
>
> . . . .
>
> There are several other instances . . . in which the Commission may, "by order", suspend or put into effect its regulations. The use of the phrase "by order" automatically gives a person or an exchange thus to be regulated the right to appeal.

78 Cong. Rec. 8092 (5/4/34). Rep. Wadsworth contended the Fish amendment additionally would make § (b) consistent with § (a), in which it was specified that the Commission would proceed only by "order." *Id.*

Opponents of the proposed amendment, who eventually won out, replied that indeed, it was the express intention of the section as drafted to preclude direct appellate review of rules or regulations promulgated by the Commission under § 19(b). Rep. Snell, in response to Rep. Fish stated:

> The proposal here is whether there shall be an appeal from the action of the Commission requiring a change in the rules of an exchange.
>
> The section provides that an interested exchange be given the right to a hearing, and after the hearing the Commission by rules and regulations determines

whether or not the change in rules shall be made. The practical question is whether or not the exchange shall be given an appeal to a court of law from the ruling of the Commission.

It is is important that we shall not give the exchanges the right to appeal and go into court from the action of the Commission in making the rules and regulations. It would subject the Commission to endless harassment.

. . . .

When we give the Commission the right, by rules and regulations to require that an exchange shall have a certain rule governing its functions, that is a quasi-legislative power of Congress. The Commission acts for Congress in establishing such rule or regulation. No one living ever heard of a claim that an interested party should have the right to restrain the action of Congress in passing laws to regulate the affairs of our country.

78 Cong. Rec. 8090-91.

Similarly, Congress did not mean to make direct appellate review available under § 25 by requiring rules and regulations to be promulgated by order. Rep. Rayburn, the floor manager of the bill, made this clear in opposing Rep. Fish's amendment. He stated:

In my opinion, we have a good bill, a fine, reasonable, sane bill; but if we adopt the amendment offered by the gentleman from New York [Mr. Fish], we shall defeat practically everything we have done in the preceding 40 pages.

. . . If you are going to say that the Commission may do this by rules and regulations, that is one thing. If you are going to say that the Commission shall formulate rules and regulations and issue them in the form of orders, that is another thing; and every one

> of them could be tied up in the courts from 12 to 24 months and thus absolutely negative the very things we have done in the preceding forty-odd pages of this bill.
>
> In my opinion, the question involved in the Fish amendment is whether or not after writing a law you are going to give the administrative body the power to make the law effective and the power to enforce it.

78 Cong. Rec. 8093.

By later compromise in the Senate-House conference, the option to proceed either by rule or regulation or by order was granted the Commission. However, that in no way vitiated the Congressional feeling as to the insularity from review under § 25(a) enjoyed by a rule or regulation promulgated by the Commission.

Reinforcement on this point is provided in the legislative hearings on § 25(a) before the Senate Committee on Banking and Commerce. The New York Stock Exchange proposed redrafting § 25(a) (§ 24(a) in the bill) so as to give standing to appeal under that section to any party aggrieved by a rule or regulation of the Commission, as well as by an order. The NYSE contended that otherwise, rules or regulations of the Commission would be totally insulated from judicial review.

The committee rejected this change. Senator Blakeley, in discussing the proposed change with the NYSE representative, made clear that avenues of review were open. For example, parties who did not wish to comply with the SEC rule could wait for enforcement proceedings to be instituted, and then challenge them in that proceeding. However, the dialogues make clear that although some might feel directly aggrieved by the application of the rule or regulation promulgated by the Commission, appeal under § 25(a) to the court of appeals would not lie. *See Hearings on S. Res. 84, S. Res. 56, & S. Res. 97 before Senate Committee on Banking & Currency*, 72d Cong., 2d Sess., and 73d Cong., 1st & 2d Sess., at 7568-7572 (1934).

In fact, the committee expressly foresaw the type of situation arising where, as here, a party might be equally aggrieved whether the Commission acted by rule or regulation or by order. Even with such recognition, however, they refused to change the provisions of § 25(a).

The worry repeatedly expressed by Congress in these attempts to subject rules and regulations of the Commission to review under § 25(a) was that courts would be substituting their judgment for that of the Commission. While it was recognized that judicial review of some nature of Commission rules or regulations would be possible, particularly on the questions of whether they were constitutional or within the statutory authority of the Commission,[7] Congress did not intend to make § 25(a) the vehicle for such review.

Examination of § 25(a) reveals the reason for the Congressional reservations. That section allows the court of appeals, in reviewing a final order entered by the Commission, "to affirm, modify, and enforce or set aside such order, in whole or in part." Further, if the court finds the record deficient, it can remand to the Commission for the taking of further evidence. Thus, under the drafting of § 25(a), the court of appeals, in reviewing Commission orders, has considerable discretion as to the terms under which it will enforce that order.[8] Congress did not want such a substitution of the court's view for that of the Commission on legislative policy matters.

At the time of the enactment of the Exchange Act, there was neither the APA nor the Declaratory Judgment Act. Thus, as to legislation, no preenforcement declaratory review was available. However, judicial review of federal legislation was always available, even if only in the enforcement proceeding itself; parties could challenge the

7. *See, e.g.*, comment of Rep. Rayburn, 78 Cong. Rec. 8091, and amplification at 8093. *Cf.* Leedom v. Kyne, *supra*.

8. It must be remembered that the standards for judicial review of agency action were not definitively established until 1951 in *Universal Camera Corp. v. NLRB*, 340 U.S. 474.

constitutionality of an act or the regularity of its enactment. Consequently, when Congress stated that it intended to insulate rules and regulations of the Commission to the same degree that acts of Congress were insulated from judicial review, it was circumscribing very closely the limits of judicial cognizance of quasi-legislative action by the Commission.[9] Allowing judicial review of the type established under § 25(a) of Commission rules and regulations was totally incompatible with the legislative powers delegated to the Commission and which Congress intended to be shared by the Commission only with Congress itself.

Despite the bulk and substance of the legislative history of the Exchange Act against their position, petitioners take solace from an isolated remark of Rep. Rayburn concerning the availability of appeal from Commission rules or regulations whose promulgation "exceeded its jurisdiction and its authority under the act." 78 Cong. Rec. 8091. However, his later amplification of this remark makes clear he was referring to the limited right to challenge the rule or regulation as one would challenge an act of Congress. 78 Cong. Rec. 8093. Although petitioners would have us equate the word "appeal" with the right to appeal under § 25(a), it is clear from the whole of the history that the appeal which he was referring to in that context was appeal to the courts for judicial review of the statutory or constitutional basis of an action. As with Congressional action, such "appeal" would only lie in an enforcement proceeding or, as postulated by Senator Blakeley, after a secondary consideration of the matter as to a particular party by the SEC.

Finally, it is worth noting that Congressional statements about the intention to insulate SEC quasi-legislative

9. To the extent Congress relented by its actions in 1946—enactment of the APA, and in 1948—the Declaratory Judgment Act, courts may take cognizance of a legislative intention to broaden the availability of judicial review of both Congressional and agency action, at least within limited parameters. *See, e.g.*, Abbott Laboratories v. Gardner, *supra*. However, that in no way affects the question of whether Congress intended to allow § 25 review of Commission rules and regulations.

action from judicial review was even more imperative at the time than such statements would be considered today. That was because of the aforementioned lack of available alternatives—such as the APA and the Declaratory Judgment Act—for seeking judicial review of congressional or quasi-legislative action.

Thus, an examination of the legislative history reveals a clear and unequivocal intention to insulate Commission rules or regulations from review under § 25(a). Having the benefit of this history, we can now turn to relevant Supreme Court decisions to determine whether intervening precedent has modified the impact of the legislative history as it relates to the question of § 25 review of Commission rules and regulations.

IV. Applicable Supreme Court Precedent.

We believe the starting point for our discussion must be *AF of L v. NLRB*, 308 U.S. 401 (1940). There, the Court was faced with a petition by the AF of L and its affiliated unions seeking review of a Board certification of the CIO-affiliated union as bargaining representative for the West Coast longshoremen. Petitioners contended that the certification was a "final order" of the Board, that they were aggrieved by the "final order," and that the certification, effectively determining the bargaining representative for an entire region, was beyond the Board's power.

Petitioners predicated their petition for review upon § 10(f) of the NLRA (Wagner Act). 29 U.S.C. § 160(f). That section provides for direct appellate review of final orders in the court of appeals by any aggrieved party. Petitioners contended the certification was a final order for purposes of review under § 10(f). However, certification was nowhere spoken of as an order of the Board. Thus, the Court was required to ascertain whether these certifications of bargaining representatives by the Board were "final orders" for purposes of the statute. 308 U.S. at 408.

In examining the statutory history, the Court noted that the predecessor statute to the Wagner Act had allowed for review of the predecessor Board's certifications of bargaining representatives; in that statute, they had been denominated "orders of certification." By the time of the debates on the Wagner Act, some experience under the prior act had been gained. As to the provisions allowing review of these "orders of certification," Congress noted, with strong disapproval, that review of these orders had caused significant problems in gaining prompt compliance with the dictates of both the act and the Board. Resultantly, Congress deleted the phrase "orders of certification" in the Wagner Act and substituted only the word "certification." With this history, the Court, in holding the certifications of the Board under the Wagner Act immune from direct appellate review under the terms of § 10(f), stated:

> Here it is evident that the entire structure of the Act emphasizes for purposes of review, the distinction between an "order" of the Board restraining an unfair labor practice [reviewable under § 10(f)] and a certification in representation proceedings. . . . [Certification], authorized by § 9, is nowhere spoken of as an order, and no procedure is prescribed for its review apart from an order prohibiting an unfair labor practice. . . . The statute on its face thus indicates a purpose to limit the review afforded by § 10 to orders of the Board prohibiting unfair labor practices, a purpose and construction which the legislative history confirms.
>
> . . . [I]n considering the provisions of § 9(d) the committee reports were emphatic in their declaration that the provisions of the bill do not extend to § 9 except as incidental to review of an order restraining an unfair labor practice under § 10. . . . The conclusion is unavoidable that Congress, as the result of a deliberate choice of conflicting policies, has excluded representa-

> tion certifications of the Board from review by federal appellate courts authorized by the Wagner Act . . . .

308 U.S. at 409-411 [footnotes omitted].

The relevance of the decision in *AF of L* is immediate and compelling. As in the legislative history of the statute the Court there examined, Congress here made it unequivocally clear that it did not intend rules or regulations promulgated by the Commission to be subject to direct appellate review. Amendments to both §§ 19(b) and 25(a) were proposed to accomplish the very result which petitioners here seek, and those amendments were rejected. And the language used by the floor manager of the bill—Rep. Rayburn—was no less emphatic in the instant case as to an intent to preclude judicial review under § 25(a) of Commission rules and regulations than was the Congressional history in the *AF of L* case.

Petitioners contend, however, that the opinion of the Supreme Court in *Columbia Broadcasting System v. United States*, 316 U.S. 407 (1942), made Commission rules and regulations subject to review under § 25(a) despite the statutory language and Congressional history to the contrary. They maintain the Court in the *Columbia Broadcasting* decision eliminated distinctions between orders and rules and regulations for purposes of review under the Exchange Act. Thus, they argue, the determinative factor for predicating review jurisdiction under § 25(a) is not whether the action is in form an order, but rather, what is the impact of the SEC's action upon the regulated parties.

In *Columbia Broadcasting*, the Court was confronted with a challenge to an order of the Federal Communications Commission promulgating the "Chain Broadcasting Regulations." The effect of those regulations was to annul the provisions of the network's contracts with its affiliates and to outlaw its previous method of conducting business. The regulations effectively stated that any station which complied with the terms of its network contract would have

its license denied at renewal time. Thus, the regulations operated to terminate the entire contractual basis on which the petitioner had built its business.

Section 402 of the Communications Act of 1934 [47 U.S.C. § 402] governed the reviewability of Commission orders and procedures to be used in obtaining such review. Under § 402(a), all orders of the Commission were subject to challenge, except those specified in § 402(b). This latter section enumerated certain orders which were to be reviewed exclusively by direct appeal to the Court of Appeals for the District of Columbia Circuit. Orders subject to review under § (b) only involved exercise by the Commission of its quasi-adjudicatory powers. For example, a denial of a license was subject to review under § (b).

Section 402(a) at the time of the *Columbia Broadcasting* decision, unlike § (b), bore little procedural semblance to its modern-day counterpart. Rather, Congress had incorporated the provisions of the Urgent Deficiencies Act, 38 Stat. 219,[10] into the section. This latter act had been passed in 1913 and established procedures for review of orders of the Interstate Commerce Commission. During the intervening twenty-one years between its original passage and its engraftment onto the Communications Act of 1934, a significant body of law had been compiled under the UDA. For present purposes, one of the most important propositions which had been established was on the scope of review jurisdiction of ICC orders under the UDA. It had been held they could be reviewed under its provisions whether they involved "the quasi-judicial function of determining controversies or . . . the delegated legislative function of rate making and rule making." *United States v. Los Angeles & S.L. R.R.*, 273 U.S. 299, 309 (1927). This entire structure was effectively incorporated into § 402(a) at the time of its passage.

Although orders effecting exercise of delegated legislative power by a regulatory agency subject to the UDA had

10. Hereinafter cited as UDA. At the time of the Columbia Broadcasting decision, it was codified at 28 U.S.C. § 47 (superseded).

been held reviewable thereunder, the availability of such review had not been without qualification. Rather, the court, in resolving the appealability issue, had to examine the substance of the orders. This examination focused upon whether the orders were "affirmative" or "negative": whether they ordered someone to do something or granted the requested relief; or whether they denied the requested relief. A third group had the characteristics of neither, i.e., an order assigning a case for hearing. Orders of the first category had been held subject to review under the UDA, while those of the last category had been held not so subject. *See, e.g., Chicago Junction Cases*, 264 U.S. 258, 263-64 (1924). Negative orders had been held subject to review only where certain criteria were met. *See, e.g., Rochester Telephone Corp. v. United States*, 307 U.S. 125, 131-32 (1939).[11]

To make the determination of whether the order was of the type subject to review, courts looked beyond the mere form in which the order was couched to determine the substantive effects upon the parties. For purposes of the UDA, it made no difference whether the substantive effect was created by the agency's exercise of its adjudicatory or quasi-legislative function. In *Powell v. United States*, 300 U.S. 276 (1937)—one of the jurisdictional cases primarily relied upon by the Supreme Court in *Columbia Broadcasting*,[12] the Court grappled with the parameters of the problem in weighing the Government's contention that the form of the order determined reviewability under the UDA. The order involved revoked a tariff which had been filed by a railroad; the impetus for the ICC's action had been a complaint filed by a competing railroad. The Government contended that the order neither named any party nor compelled any action. Rather, it contended, it was merely a

11. The Court noted there that one of the hurdles to be overcome in seeking review of certain types of "negative" orders under the UDA was the "specific terms of the statute granting to the district court jurisdiction in suits challenging 'any order' of the Commission." 307 U.S. at 132.

12. We note that *Powell* was always cited in tandem with *AF of L v. NLRB, supra*, in the *Columbia Broadcasting* opinion.

record of the ICC's action revoking the tariff and was, therefore, nonreviewable under the UDA. The Court disagreed, stating:

> But overemphasis upon the mere form of the *order* may not be permitted to obscure its purpose and effect . . . . In effect, the order grants the requested relief sought by the Central's complaint. . . . Interpreted according to its purposes, the order is in substance an affirmative one and therefore reviewable under the statute.

300 U.S. at 276 [emphasis supplied; citations omitted].

As in *Powell*, the Government in *Columbia Broadcasting* contended the FCC's order promulgating the regulations was not subject to review under § 402(a). It argued that since the order was not directed against any particular person, penalized no past conduct, and merely established future guidelines for the renewal of radio licenses by the FCC, the order was not the type of order reviewable under § 402(a).

Against the background of the mass of precedent arising under the UDA as to amenability of agency orders to review under its provisions, the Court rejected the Government's arguments. It stated the "label" put upon an order by the FCC was not decisive for purposes of review under the statute. Rather, the *order* had to be examined to determine its net impact upon the regulated parties, as mandated in *Powell*. Then the order had to be examined to determine whether it was the type of order for which review was intended under the statute, as mandated in *AF of L v. NLRB*. The carry-through of these central concepts into the *Columbia Broadcasting* decision is reflected in the Court's conclusion predicating reviewability that: (1) the order (2) promulgates regulations which operate to control contractual relationships of the regulated parties; (3) even though not directed against any particular party, (4) it

determines rights generally and (5) is therefore reviewable under the UDA. 316 U.S. at 417.

Petitioners here contend, however, the fact that review of an FCC order was involved in *Columbia Broadcasting* was inconsequential to the Court's resolution of the jurisdictional issue there presented. They point to repeated statements by the Court that because these regulations, issued by the Commission in the avowed exercise of its quasi-legislative powers, had a substantial impact upon the business affairs of the petitioner, they were subject to review under § 402(a). Thus, they contend, the operative factor determining reviewability is not the form of the administrative action; rather, it is the substantive effect of the agency's action upon the regulated parties.

First, the Court in *Columbia Broadcasting* was not faced with the question of whether quasi-legislative actions of the agency per se were subject to review under the UDA. It had long been a settled doctrine that *orders* of those agencies subject to review under the UDA, e.g., the ICC, could be reviewed whether they involved a quasi-judicial or -legislative exercise of that agency's powers. The crucial factor for jurisdictional purposes was the substantive effect upon the parties.

Second, whereas orders of the FCC involving the exercise of certain of its quasi-adjudicatory powers could be reviewed only under § 402(b), quasi-legislative orders of the Commission, if they were subject to immediate appellate review at all, were so subject only under § 402(a). The Government interposed an argument that the proper procedure for obtaining review of the FCC's action was under § 402(b), the subsection specifically intended only for clearly adjudicatory orders of the Commission.

The Court rejected the Government's contention. The Court emphasized the Commission had chosen to exercise its delegated legislative powers to implement the challenged guidelines. Consequently, the Court would not entertain an argument that the petitioners be relegated to that judi-

cial review under § 402(b), or otherwise, which would be the proper procedure for reviewing the Commission's actions had it acted by adjudicatory order. Rather, because the Commission's order was a quasi-legislative exercise of its delegated powers, the only proper method of reviewing that order lay exclusively under § 402(a). And because of its impact upon the parties, the order was of the type reviewable under the UDA. 316 U.S. at 421-22.

Thus, in *Columbia Broadcasting* the Court was faced with the contention that a clearly quasi-legislative exercise of power should be subjected to review under the provisions set up exclusively for review of adjudicatory orders of the FCC. Although the contention was pressed there to defeat the Court's exercise of its jurisdiction while petitioners press the argument upon us here in their attempt to invoke our jurisdiction, the mandate of the Court is still directly applicable to the instant case: the contention must be rejected.

Finally, although the Court in *Columbia Broadcasting* talked of the impact of the regulations upon the parties and the use by the Commission of its rule-making power, the Court made clear it was not concerned with the reviewability of the regulations *qua* regulations. Rather, the regulations and their impact upon the regulated industry were relevant only because they constituted the substance of the order under review. The substance of the order had to be analyzed to determine whether it was an affirmative order or the type of negative order subject to review under the UDA—in which case, the Court had jurisdiction to review the order under § 402(a)—or whether it was an unreviewable order under the precedent attaching under the UDA. Resultantly, the terms and effects of the regulations had to be scrutinized. In this regard, the Court stated:

> Such regulations have the force of law before their sanctions are invoked as well as after. *When, as here, they are promulgated by order of the Commission and* the expected conformity to them causes in-

> jury cognizable by a court of equity, they are appropriately the subject of attack under the provisions of § 402(a) and the Urgent Deficiencies Act.
>
> . . . .
>
> The purposes sought to be accomplished by § 402(a) and the Urgent Deficiencies Act *would be defeated* if a suitor were unable to resort to them to avoid reasonably anticipated injury resulting from such legal consequences of the Commission's order, merely because the Commission as yet had neither refused to renew a license, as the regulations require, nor cancelled a license, as the regulations permit. Such an argument addressed to the form rather than the substance of the *order* was rejected in *Powell* . . . .

316 U.S. at 418-19 [emphases supplied; citations omitted].

Thus, following the mandate of earlier cases, the Supreme Court analyzed the review provisions of the statute, as well as the obvious understanding by Congress [13] of what incorporation of the UDA into the review provisions of the Communications Act meant. Next, it compared the types of actions under the two review subsections of the statute to determine which was applicable. Finally, it concluded because of the terms of the order promulgating the regulations, that it was the intendment of the statute to subject such orders to review under § 402(a). In fact, it concluded that by not allowing judicial review of the challenged order, it would actually be defeating the design of the Communications Act and, inter alia, the UDA, as drafted.

Consequently, we are compelled to reject petitioners' contention that the Court's decision in *Columbia Broadcasting* requires this court to assume jurisdiction over this appeal under § 25(a). On the contrary, we believe

13. We note the same session of the same Congress enacted both the Exchange Act and the Communications Act of 1934. They were enacted one day apart—June 6 & 7, 1934, respectively.

the Court's deference to statutory design and intention reinforces our conclusion that in fact no jurisdiction lies in this court under § 25(a) to undertake direct appellate review of Rule 19b-2.[14]

We find the progeny of *Columbia Broadcasting*, also cited to us by petitioners, to be similarly distinguishable. The first, *United States v. Storer Broadcasting Co.*, 351 U.S. 192, involved another set of FCC regulations promulgated by order of the Commission. Although § 402(a) had been changed procedurally to its present form, the Court found the decision in *Columbia Broadcasting* controlling on the substantive question of whether the order was subject to review under the terms of § 402(a). As before, the decisive factor for purposes of determining reviewability of the *order* promulgating the regulations was the impact of those regulations upon the parties. However, as with *Columbia Broadcasting*, examination of the regulations was relevant only to ascertaining the effect of the order for purposes of review. Thus again, the Court was not faced with the question of the reviewability of regulations *qua* regulations nor of a statutory design precluding certain types of review of specified agency actions.

The second case is equally uncompelling. *Frozen Foods Express v. United States*, 351 U.S. 40 (1956). That decision merely involved the reviewability under the UDA of an ICC order promulgating regulations. Therefore, it involved the same jurisdictional issue discussed and settled in *Columbia Broadcasting* and its predecessors. Resultantly, it advances petitioners' case no further than did these previous cases.

The final case urged as mandating our exercise of jurisdiction under § 25(a) which merits our consideration is *Florida East Coast Ry. v. United States*, 410 U.S. 224 (1973). Jurisdictionally, the case was in the same posture

14. Additionally, we note § 25(a) has never borne any semblance to the provisions of the UDA, nor did the draftsmen express any intent to incorporate any element of that act. Thus, the legislative history and precedent under that act cannot be attributed in any way to § 25.

as that involved in *Columbia Broadcasting*, *Frozen Foods Express*, and *Storer Broadcasting*, and is therefore equally unavailing to petitioners. However, we note in that opinion a continuing admonition that courts pay the legislative history and intendment of a statute great deference in determining the scope of that statute and the specific burdens delegated thereunder.

Thus, our examination of the authority cited to us by petitioners convinces us that not only have the dictates of the Supreme Court of *AF of L v. NLRB* not been questioned, but in fact they have been reiterated again and again, even in the cases cited to us by petitioners. The thrust of each of them is that courts should carefully scrutinize the statute and its history to determine the intendment of Congress as manifested in the terms of the statute. Such an examination convinces us that Congress intended to withhold the type of review here sought by petitioners. We conclude this court has no jurisdiction under § 25(a) to review on direct appeal rules and regulations promulgated by the Commission. Therefore, we reject petitioners' contention that jurisdiction lies in this court under § 25(a) to review Rule 19b-2 because of its substantive impact upon their business relationships.

V. The Permissible Scope of Commission Rules and Regulations.

In the alternative, petitioners contend that even if Rule 19b-2 is not constructively an order—and therefore reviewable as such under § 25(a)—because of its impact upon the regulated parties as a whole, it is constructively an order because of the singular nature of its impact. The major premise of petitioners' syllogism is that agency action directed against a single regulated party is in substance an order. Their minor premise is that this rule is directed solely against the membership practices of the PBW. Therefore, they conclude, Rule 19b-2 is an order. Since this court has jurisdiction under § 25(a) to

review orders of the Commission, Rule 19b-2 is properly subject to § 25 review.

Initially, we note that § 19(b) gives the Commission the power to proceed against a single exchange by rule or regulation or by order. The courts have consistently held that where an agency, as in this case, is given an option to proceed by rulemaking or by individual adjudication the choice is one that lies in the informed discretion of the administrative agency. *N.L.R.B. v. Wyman-Gordon Co.*, 394 U.S. 759, 772 (1969) (concurring opinion); *S.E.C. v. Chenery Corp.*, 332 U.S. 194, 203 (1947). This proposition is not altered by the fact that the resultant rule may be directly applicable to specific individuals or situations when it has enough other characteristics of a rule. Section 2(c) of the Administrative Procedure Act, 5 U.S.C.A. § 551(4) (1966), explicitly recognizes this policy in its definition of a rule as any "agency statement of general *or particular* applicability and future effect designed to implement, interpret, or prescribe law or policy" (emphasis added). *See 1 K. Davis, Administrative Law Treatise*, § 5.02 (1958). However, significant evidence exists that the rule in fact was not directed solely against the PBW. Although the PBW has perhaps been a leader in seeking the membership of certain types of institutional investors whose membership other exchanges have excluded, all exchanges have had rules prohibiting certain types of institutional membership. Now, however, all exchanges will have to bring their rules into compliance with Rule 19b-2. Thus, whereas the PBW may be forced to not solicit certain types of firms whose membership it might otherwise desire, all exchanges, including the PBW, may be forced to deal with companies as members in the future whose membership in the past they have excluded. Because of this, as oral argument developed, certain exchange which originally supported adoption of the rule have had second thoughts about its implementation when they have realized the latent manifestations of its application to them.

While no attempt precisely to define rulemaking can be wholly successful, the essence of its meaning is generally understood. Rulemaking by an agency characteristically involves the promulgation of concrete proposals, declaring generally applicable policies binding upon the affected public generally, but not adjudicating the rights and obligations of the parties before it. *See generally 1 K. Davis, Administrative Law Treatise*, § 5.01 (1958). Furthermore, rules ordinarily look to the future and are applied prospectively only, whereas orders are directed retrospectively, typically applying law and policy to past facts. Given these general guidelines, Rule 19b-2 is most easily classified as the product of a rulemaking rather than an adjudicatory proceeding. The rule applies to all members of all exchanges, not just to PBW and its members. Further, it provides specific standards to regulate the future membership practices of the exchanges rather than focusing on the past practices of any particular exchange. Thus, on its face, Rule 19b-2 appears to be a rule of prospective application and applicable across the board, although the rule may affect each of the exchanges to differing degrees. *Cf. Florida East Coast Ry. v. United States*, 410 U.S. 245-46.

In saying this, we do not mean to imply that even were this rule directed solely against the PBW, we would thereby have power under § 25(a) to subject the rule or regulation to direct appellate review. Congress gave the Commission the power to proceed against a single exchange by rule or by order.[15] Further, as in the instant case, whether or not the rule is so directed may be open to considerable dispute. Such questions are better resolved by a forum whose function is fact-finding, a function which the court of appeals in the first instance is singularly ill-equipped to perform.

15. Of course, if a court were confronted with a situation in which the Commission attempted to cloak clearly quasi-judicial action in quasi-legislative garb, different factors might militate in favor of this court's review. We are not faced with such a situation in the instant case.

As to the question of whether a rule can be constitutionally aimed against a single exchange, and whether due process mandates have been complied with in making the rule against the exchange, Congress made clear that such questions were not immune from judicial review. However, as we earlier stated, the availability of judicial review is not to be equated exclusively with the jurisdictional grant to this court under § 25(a).

Therefore, like the petitioners' first contention, we find the petitioners' second contention insufficiently founded in law to warrant this court's assumption of jurisdiction under § 25(a).

VI. Conclusion.

Our review of the statute and its legislative history convinces us that Congress intended to insulate rules or regulations promulgated by the Commission under § 19(b) from direct appellate review in this court under § 25(a) of the Exchange Act. Further, we conclude that applicable Supreme Court precedent binds us to giving full effect to the Congressional preclusionary intendment. We reject petitioners' contentions that Supreme Court decisions subsequent to the passage of this legislation nullified, or even diluted, distinctions between Commission rules and orders for purposes of direct appellate review, in derogation of the statutory design. Finally, we cannot accept without any fact-finding that as a matter of law, this rule was aimed solely against the PBW. Nor can we, at this juncture, even conclude that were this so, this court would thereby acquire jurisdiction under § 25(a).

Therefore, we believe the motion of the SEC to dismiss this appeal for lack of jurisdiction under § 25(a) of the Exchange Act, or any other applicable statute, must be granted. We emphasize that in so doing, we express no opinion on the merits. Nor, we reiterate, do we mean any statement concerning the availability of direct appellate review in this court under § 25(a) to reflect adversely on the availability of other forms of judicial review, including

preenforcement relief under the Declaratory Judgment Act and § 10 of the APA.

The motion of the Securities and Exchange Commission to dismiss these petitions for lack of jurisdiction will be granted.

ADAMS, *Circuit Judge*, dissenting:

The controversy now before us had its genesis in the concern of the Securities and Exchange Commission (Commission) regarding the effect on the securities industry of the "institutional investor."[1] An "institutional investor" is, typically, an insurance company, a pension fund, a foundation, or a mutual fund. In recent years, the increase of institutional involvement in the stock markets has, the Commission believes, led to an erosion of the public's ability and willingness to invest in equity securities. One remedy decided upon by the Commission has been the creation of a "single central market system for listed securities." An essential first step in the implementation of such an arrangement, it is thought, is assuring that exchange membership be used primarily for "public purposes."[2]

Against this backdrop, and with these goals in view, the Commission took the action complained of here. Specifically, on January 16, 1973, the Commission promulgated its Rule 19b-2,[3] relying upon authority purportedly con-

1. *See, e.g.*, Securities and Exchange Commission, *Statement on the Future of the Securities Markets* (6 P.O. ed. 1972); *Securities and Exchange Commission Institutional Investor Study Report*, H.R. Doc. No. 92-64, 92d Cong., 1st Sess. (1971).

2. *See generally* Securities and Exchange Commission, Statement, *supra*, at 6-22.

3. 17 CFR 240.19b-2 (1973). The Commission published the Rule, along with an extensive discussion thereof, in Release No. 9950, hereinafter cited as "Release."

On May 26, 1972, the Commission wrote individual letters to the exchanges, requesting the voluntary adoption by each exchange of a rule incorporating the substance of Rule 19b-2. PBW Stock Exchange, Inc., refused.

ferred by the Securities Exchange Act of 1934.[4] Entitled "Utilization of Exchange Memberships for Public Purposes," the Rule restricts membership on registered securities exchanges to those who transact at least eighty per cent of their brokerage business on such exchanges "for or with persons other than affiliated persons." Thus, for example, if an insurance company had a subsidiary with a seat on an exchange, which did eighty per cent of its business on behalf of the insurance company, the subsidiary would be disqualified from exchange membership. Stated otherwise, the Rule effectively prohibits "institutional membership" on securities exchanges.[5]

Invoking the jurisdiction they believe is afforded this Court by section 25(a) of the Exchange Act, 15 U.S.C. § 78y(a), petitioners sought review here of the Commission's proscription of institutional membership.

Their petition challenged the Commission's power under the Exchange Act to adopt the Rule, claimed that the procedures attending the Rule's formulation violated

3. (Continued)

According to the Commission, it was the only exchange that seriously opposed the expulsion of institutional members (SEC White Paper on Institutional Membership, presented to the Senate Subcommittee on Securities of the Committee on Banking, Housing and Urban Affairs, April 20, 1972, at p. 30). The Commission then published Rule 19b-2 for comment on August 3, 1972. PBW requested a hearing prior to adoption of the Rule, and the Commission denied the request. Written comment on the proposed Rule was received, oral argument heard, and it was adopted on January 16, 1973.

4. The Commission cites sections 2, 6, 11, 17, 19 and 23 of the Exchange Act, 15 U.S.C. §§ 78b, 78f, 78k, 78q, 78s and 78w, as providing the substantive authority for promulgation of the Rule, and invokes section 4 of the Administrative Procedure Act, 5 U.S.C. § 553, as authorizing its use of rule-making procedures in the Rule's formulation and adoption.

5. The Rule is designed to effectuate the Commission's determination that:

"The nation's securities exchanges are effected with and intended to be responsive to the public interest; that membership on such exchanges should carry with it an obligation to serve investors dealing on those exchanges; and that *membership utilized primarily for the purpose of proprietary trading for the account of the member or for an account in which it has an interest or for the purpose of rebating or recapturing commissions charged on exchange securities transactions, directly or indirectly, is inimical to the protection of investors*, fair dealing in securities traded in [sic] upon such exchanges, and the interests of the public investors we are mandated to protect. . . ." Release, at 1-2. (Emphasis added)

petitioners' constitutional rights, and charged that the Rule's effect upon competitive conditions in the securities industry transgressed the antitrust laws.

Inasmuch as the terms of section 25(a) provide for review by this Court of "order[s] issued by the Commission," the majority asserts that we are without jurisdiction to review what has been denominated by the Commission as a "rule" and not an "order." For the reasons to be discussed below, I cannot join in such a restrictive reading of section 25(a). The substance of the Commission's action—not merely the label affixed to it by the Commission itself—should, in my judgment, determine whether jurisdiction to review that action lies in this Court under section 25(a).[6]

This is no desiccated academic discussion, for the Commission's action, that petitioners seek to have reviewed here, will, if sustained, have a far-reaching impact upon the economic interests of the New York exchange, the regional exchanges, and particularly of these petitioners. Thus, I believe we should proceed to the merits of their contentions, notwithstanding that no formal "order" is before us. Accordingly, I respectfully dissent.

I.

The PBW Stock Exchange, Inc., a petitioner here, is one of twelve national securities exchanges registered with the Commission pursuant to section 6(a) of the Exchange Act. In 1968 PBW began active solicitation of "institutional" members.[7] At the time this case was brought, the Exchange had gained 38 institutional members, which pro-

6. *See* Columbia Broadcasting System, Inc. v. United States, 316 U.S. 407, 416 (1942); *See also* L. Loss, Securities Regulation 1140 n.2 (1951 ed.).

7. *See* Statement of Philadelphia-Baltimore-Washington Stock Exchange Regarding Institutional Membership, Oct., 1971, at p. 1.

Since the majority would dismiss this case on jurisdictional grounds, it is appropriate that we take as true the "allegations" of the petitioners in determining whether jurisdiction lies. Accordingly, this opinion, as do the majority, makes liberal use of the supporting factual material submitted by the petitioners.

vided some 40 per cent of its revenues. Those members have committed approximately 50 million dollars in capital to the Exchange, and have "contributed to the viability of PBW as a competitive market place."[8] PBW is apparently the only registered exchange so heavily dependent upon institutional membership.[9]

Petitioner Equity Services, Inc. is a registered broker-dealer, and has been a member of PBW since February of 1972. Equity is a subsidiary of the National Life Insurance Company of Vermont, and executes portfolio transactions on the Exchange for both the general account of National Life and for three mutual funds sponsored by National Life.

Penn Mutual Securities Corporation, another petitioner, is a wholly-owned subsidiary of the Penn Mutual Life Insurance Company. A registered broker-dealer, it has been a member of the PBW Stock Exchange since June of 1972, and its business consists entirely of the execution of portfolio transactions for its parent.

Petitioner Guardian Advisers, Inc., also a registered broker-dealer, is a wholly-owned subsidiary of the Guardian Life Insurance Company of America. It executes portfolio transactions for the general account of Guardian Life, for a mutual fund sponsored by Guardian, and for another affiliate of Guardian.

Petitioner Connecticut Nutmeg Securities, Inc., a registered broker-dealer organized to execute exchange transactions for the State of Connecticut's pension and trust funds, has been a member of PBW since December of 1972. Eighty-two per cent of its stock is owned by Connecticut Mutual Equity Fund, a consortium of several state pension, environmental, and welfare funds. The remaining eighteen

8. Brief of PBW Stock Exchange, Inc. at p. 6.

9. The Pacific Coast Stock Exchange was the first exchange to admit to membership subsidiaries of institutional investors. It now has 18 members. The Midwest Stock Exchange admits such members if they do at least 50 per cent of their business on the exchange with non-affiliated customers. The Boston Stock Exchange has a few institutional members.

per cent of its stock is owned by the Office of the Treasurer of the State of Connecticut. Petitioner Robert I. Berdon, the Treasurer and Chief Financial Officer of Connecticut, is the president of Nutmeg.

Much of PBW's growth over the last few years is attributable to the presence on the exchange of institutional members.[10] The investing institutions now bring their trading orders directly to the exchange floor through the medium of their broker-affiliates, rather than through the less direct channel afforded by non-affiliated brokerage houses. This process has resulted in an increased number of exchange floor transactions, benefiting both the institutions and the independent traders seeking execution of orders.[11] Too, institutional membership has given rise to an increased flow of "reciprocal" orders, that is, of small orders placed with the broker-affiliate for execution in Philadelphia, and given in return for a large institutional order sent for execution to an independent broker on the New York Exchange.[12]

The existence of institutional members has fostered a sizeable influx of capital into PBW and the securities industry generally. Unlike many broker-dealers who apparently devote much capital to a wide range of other investment activities, PBW's institutional members dedicate substantially all their capital to their activities as brokers or dealers in publicly-traded securities.[13] The added infusion of funds that would result from the continued solicitation of institutional members would furnish a needed palliative to what is recognized as an undercapitalized industry.[14] To date, the capital flow generated by institutional membership has been of particular benefit

10. Between 1968, when PBW began soliciting institutional memberships, and 1971, trading on the exchange increased from 48 million to 112 million shares. *See* Statement of PBW, *supra*, at p. 5.

11. *Id.*, at p. 6.

12. *Id.*

13. *Id.*

14. *Id.*

to PBW, which competes actively for business and capital with the New York and American Exchanges.

Viewed from the perspective of the institutional investors and their broker-affiliates, the ability to acquire and maintain membership on registered exchanges produces substantial economic benefits. Without a broker-affiliate, an institution desirous of executing an order on an exchange must, of course, work through the medium of an independent, non-affiliated exchange member. Needless to say, the brokerage services of non-affiliated exchange members are not dispensed gratuitously. The institution pays a commission for the execution of its order. Inasmuch as institutions customarily undertake trades involving millions of dollars, the amount paid in commissions is not small. Thus, utilization of affiliated exchange members results in significant savings to the institution, in the form of "recaptured" or "rebated" commissions.[15] These savings redound to the benefit of the institution's shareholders, policy holders, or beneficiaries.

The foregoing discussion underscores the potential magnitude of the impact of the Commission's action on the petitioners. If the validity of Rule 19b-2 is sustained, PBW can solicit no more institutional members, and must "phase out" its current institutional members over a three-year period.[16] If the current vitality and viability of PBW hinges upon the presence of institutional members, PBW asserts that Rule 19b-2 will usher in an era of stagnation, or will result in its utter demise. And, even assuming PBW has overstated the degree of its dependence upon its institutional members, it seems undeniable that the portion of its revenues attributable to those members will, at the very least, greatly diminish.

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15. *See* Note 5, *supra*.

16. This discussion assumes that, from the point of view of the investing institution, it would ordinarily not be feasible to maintain membership on an exchange in the face of a rigid requirement that 80 per cent of its exchange business be transacted with or for the "public." Only 15 out of the 38 institutional members of PBW derive as much as 50 per cent of their revenues from non-affiliated customers. *See* Statement of PBW, *supra*, at p. 3.

The other petitioners—the institutional members themselves—will, perhaps, suffer even more drastic repercussions from the promulgation of Rule 19b-2. Each will be forced to undertake a fundamental transformation of its business, from the status of a "broker-affiliate" of an institution to that, in effect, of an "independent" broker-dealer. More likely, the petitioner-brokers will simply go out of business, for, after all, each was formed with a view to acquiring exchange membership as a broker-affiliate of an institution. If we posit that it will not be feasible for an institution to maintain a broker-affiliate after Rule 19b-2 is in effect, institutions that have utilized broker-affiliates will again be forced to expend substantial amounts, in commissions, every time a trading order is executed.

It is thus apparent that the practical effect of the Commission's promulgation of Rule 19b-2, if that action is sustained, will be calamitous for the petitioners in this case. To them, the Commission's action is neither "abstract, theoretical, nor academic."[17] Viewed as a substantive matter, the Rule would effectively determine their rights, and following upon that determination would come a major dislocation and transformation of their day-to-day business affairs.

II.

Since the enactment in 1946 of the Administrative Procedure Act ("APA") the federal courts have entertained a "presumption" in favor of the reviewability of administrative action. In Abbott Laboratories v. Gardner,[18] the Supreme Court undertook to trace the contours of that presumption. The petitioners there had sought in a district court pre-enforcement review[19] of drug-labeling

17. Frozen Food Express v. United States, 351 U.S. 40, 44 (1956).

18. 387 U.S. 136 (1967).

19. The petitioners in *Abbott* had, at least theoretically, a right to later review of the FDA action in enforcement proceedings. *See* Vining, *Direct Judicial Review and the Doctrine of Ripeness in Administrative Law*, 69 Mich. L. Rev. 1445 (1971).

regulations promulgated by the Commissioner of Food and Drugs. The district court reached the merits of petitioners' contentions and granted relief. This Court, however, thought that Congress had impliedly expressed an intention to withhold from the district courts any jurisdiction to undertake pre-enforcement review of the regulations. Accordingly, we reversed the district court. The Supreme Court reversed us in turn, finding that nothing in the Food, Drug, and Cosmetic Act precluded the institution of such action.[20]

The Supreme Court in *Abbott* reached its result by a course laden with instruction that should inform the present inquiry. Justice Harlan, speaking for the majority, perceived first that:

> "[T]he Administrative Procedure Act . . . embodies the basic presumption of judicial review to one 'suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute,' . . . so long as no statute precludes such relief or the action is not one committed by law to agency discretion. . . ."[21]

He then cited a portion of the APA's legislative history expressing the intention of Congress that, after passage of that Act, statutes would be deemed preclusive of judicial review only if "clear and convincing evidence" of an intent to deny review could be adduced.[22] Commenting upon the Court's earlier exegeses of the APA's legislative history, Justice Harlan reiterated that the APA's " 'generous review provisions' must be given a 'hospitable interpretation.' "[23] The majority's pronouncements in *Abbott* pro-

20. 387 U.S. at 148, 156.

21. *Id.* at 140.

22. *Id.* at 140 n.2. Specifically, Justice Harlan cited H.R. Rep. No. 1980, 79th Cong., 2d Sess., 41 (1946). *See also* S. Rep. No. 752, 79th Cong., 1st Sess., 26 (1945).

23. 387 U.S. at 140-41. *See* Rusk v. Cort, 369 U.S. 367 (1962); Shaughnessy v. Pedreiro, 349 U.S. 48 (1955).

vided firm conceptual underpinning for the thoroughgoing inquiry then undertaken into the history of the Food, Drug, and Cosmetic Act.[24] Unable to discern in that Act's background any clear, convincing and unambiguous evidence of an intent to preclude review, Justice Harlan determined that the case should be remanded to this Court for consideration on the merits.[25]

While the question immediately before the Court in *Abbott* involved the availability of review of agency action in the district court,[26] the significance of the reasoning and language there employed reaches well beyond the particular facts of that case. Justice Harlan, in his elucidation of the APA's impact upon the law of reviewability, relied principally on two sections of the APA that bear directly upon the present controversy. First, he referred to section 10(a), 5 U.S.C. § 702, as the "embodiment" of the presumption favoring reviewability. Second, he cited section 10(c), 5 U.S.C. § 704, as being among the "generous review provisions" entitled to a "hospitable" interpretation.

What is particularly germane to our inquiry is the fact that both section 10(a) and 10(c) advert to other statutes specially tailored to provide for judicial review of agency action. Section 10(a) extends review to persons "adversely affected . . . by agency action *within the meaning of a relevant statute*," while 10(c) provides, inter alia, that "[a]gency action *made reviewable by statute* . . . [is] subject to judicial review."[27] (Emphasis added) It works no distortion of Justice Harlan's analysis in *Abbott* to conclude that the "hospitable" interpretation afforded the

24. 387 U.S. at 141-46.

25. *Id.* at 156.

26. The availability of district court review to petitioners in this case is a question the majority treats as being entirely distinct from that of the availability of review in a court of appeals under section 25(a). (See Maj. Opinion at p. 6, n.3.)

27. In addition, section 10(c) of the APA, 5 U.S.C. § 703, provides that:

"The form of proceeding for judicial review is the special statutory proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action. . . ."

statutory language pertinent in that case must extend to *all* of the language in the cited sections of the APA.[28] Thus, since sections 25(a) of the Exchange Act appears, at least *prima facie*, to be a "relevant statute" within the meaning of 19(a) of the APA, and a "statute" within 10(c), the interpretive leeway stipulated by *Abbott* regarding those sections must, in some fashion, affect an appropriate construction of section 25(a).[29]

Our task, then, is to follow the course charted in *Abbott*—a course whose outer limits it was unnecessary to explore in that case—and apply the principles enunciated there to a determination of the proper interpretive stance to assume in construing section 25(a).[30]

If the presumption of reviewability is to have significance in the interpretation of special statutory review provisions, the presumption must, somehow, actually structure our reading of the provision in question. Thus, confronted with the special review procedure set forth in section 25(a), it would not seem amiss to presume that Congress intended, at least after the passage of the APA, for that section to be read broadly, "generously," and "hospitably."[31] We presume, in short, in favor of the re-

28. *See* Vining, *supra*, at 1457.

29. It is not suggested that section 10(c) of the APA, *ex proprio vigore*, renders any and every "agency action" of the Commission reviewable under section 25(a) of the Exchange Act. But inasmuch as 25(a) is a "statute" providing for review of "agency action" and therefore within contemplation of 10(c), the latter section cannot be deemed to have *no* effect on the former. See Vining, *supra*, at 1445 n.4, 1463-65.

30. In Medical Committee for Human Rights v. Securities and Exchange Commission, 432 F.2d 659, 666 (D.C. Cir. 1970), *vacated as moot*, 404 U.S. 403 (1972), Judge Tamm likewise concluded that the APA and its elucidation in *Abbott* provided a suitable point of departure for an inquiry into the scope of section 25(a) of the Exchange Act. *Cf.* Independent Broker-Dealers' Trade Ass'n v. Securities and Exchange Commission, 442 F.2d 132, 140 (D.C. Cir.), *cert. denied*, 404 U.S. 828 (1971).

In City of Chicago v. United States, 396 U.S. 162, 164 (1969), the Court relied on *Abbott* as the springboard for an inquiry into the scope of a statutory provision for review of "orders" of the Interstate Commerce Commission.

31. This is not to assert that Congress intended, by passage of the APA in 1946, to clarify or modify the intent it had had when enacting the Exchange Act some 12 years earlier. Rather, the APA is properly viewed as a guide to courts faced with the labor of determining the parameters of review jurisdiction generally. The APA establishes, in effect, a rule of judicial decision,

viewability of agency action colorably within the terms of the section.[32] Pursuing *Abbott*'s teachings further, a cribbed or miserly reading of section 25(a) would be called for only where there was "clear and convincing evidence" of a Congressional intent that the section be so confined.

Accordingly, our initial problem in ascertaining the scope of 25(a) is to determine what constitutes a "restrictive" reading of the statute, and, conversely, what may properly be deemed a "generous" reading.

III.

Though the endeavor of statutory construction in any given case need not end with the words of the enactment, a court should certainly begin there.[33] Admittedly, an initial scrutiny of the terms of section 25(a) might seem, as the majority feels, to put an end to our inquiry:

> "Any person aggrieved *by an order* issued by the Commission in a proceeding under this title to which such person is a party may obtain review *of such order* in the Court of Appeals of the United States, within any circuit wherein such person resides or has his principal place of business. . . ." (Emphasis added)

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31. (Continued)

by which courts are directed to require a certain quantum of proof before settling upon a restrictive reading of any review provision. The existence *vel non* of that proof—of evidence of legislative intent—is in no way affected by the strictures of the APA.

This view of the APA's effect on prior enactments is borne out by *Abbott*. The Food, Drug and Cosmetic Act, considered in that case, was passed several years *before* passage of the APA. Yet the Supreme Court's approach in construing the former statute was dictated, the Court held, by the provisions of the APA.

32. The Court has, in other cases, characterized the review provisions of the APA as "broadly remedial." Rusk v. Cort, *supra*, 369 U.S. at 379; Heikkila v. Barber, 345 U.S. 229, 232 (1953). Section 10 of the APA was, according to the House Judiciary Committee on the APA, "designed to afford a remedy for every legal wrong." H.R. Rep. No. 1980, 79th Cong., 2d Sess. (1946) (reprinted in Administrative Procedure Act, Legislative History (G.P.O. ed., 1946)).

33. *See* Frankfurter, *Some Reflections on the Reading of Statutes*, in Essays on Jurisprudence from the Columbia Law Review 43, 51 (1963).

Were statutory construction an exercise undertaken *in vacuo*, uninformed by practical considerations, experience, or precedent in related area of the law, there might be no basis for concluding that adherence to the literal terms of this statute, clear in themselves, is in any sense "restrictive." But here, we have at hand an extensive body of writing in the field of administrative procedure, by courts and commentators alike, against which to contrast the literal reading of 25(a) espoused by the majority. The contrast provides a firm foundation for the conclusion that the limitation of review under 25(a) to formal "orders" is indeed restrictive.

In the seminal case of Columbia Broadcasting System, Inc. v. United States,[34] the Supreme Court considered the reviewability of action taken by the Federal Communications Commission. The Commission had, by a document formally denominated an "order," issued regulations designed to control certain contractual relations between broadcasting networks and their affiliated stations.[35] CBS brought an action in the district court to have the regulations set aside, invoking the district court's jurisdiction under section 402(a) of the Communications Act of 1934, and the Urgent Deficiencies Act.[36] Inasmuch as the regulations had been issued in the form of an "order," the precise question before the Court could, perhaps, be framed as whether the "order" in question was of the type made reviewable by section 402(a). Nonetheless, the Court directed its attention not to the narrow issue alone, but considered whether the regulations, *viewed as regulations*, were reviewable.[37] Seen from such a perspective, the Court's

34. 316 U.S. 407 (1942) (hereinafter *"CBS"*).

35. Termed the "Chain Broadcasting Regulations," the regulations effectively prohibited certain exclusive dealing provisions that were customarily written into network-station agreements. *See CBS, supra*, 316 U.S. at 412.

36. Section 402(a), by incorporating the structure of the Urgent Deficiencies Act, provided for district court review of all Federal Communication Commission "orders" except those specified in section 402(b).

37. See *CBS, supra*, 316 U.S. at 416, 418-19, 421.

conclusion, and, more importantly, the methodology used to reach that conclusion, serve as an apt benchmark against which to measure the approach by the majority here to section 25(a) of the Exchange Act.[38]

The FCC had styled the Chain Broadcasting Regulations as "the expression of general policy we will follow in exercising our licensing power."[39] Recognizing that the FCC had adopted the regulations under its rulemaking power, the Court did not hesitate to characterize them as "regulations which affect or determine rights generally, even though not directed to any particular person or corporation. . . ."[40] But in answer to the contention that this concededly "legislative" character rendered the regulations unreviewable, the Supreme Court declined to embrace, as the touchstone or reviewability, the distinction between agency "adjudication" and "quasi-legislation."[41] Rather, it scrutinized the practical import of the agency's action:

> ". . . [A] valid exercise of the rulemaking power is addressed to and sets a standard of conduct for all to whom its terms apply. It operates as such in advance of the imposition of sanctions upon any particular individual. It is common experience that men conform their conduct to regulations by governmental authority so as to avoid the unpleasant legal consequences which failure to conform entails. . . .
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> "Such regulations have the force of law before their sanctions are invoked as well as after. When, as

38. *Cf.* Independent Broker-Dealers' Trade Ass'n v. Securities and Exchange Commission, 442 F.2d 132, 141 (D.C. Cir.), *cert. denied*, 404 U.S. 828 (1971).

39. 316 U.S. at 411.

40. *Id.* at 417.

41. The usefulness of the distinction between agency "rulemaking" and "adjudication" is often overstated. Other courts have agreed. *See e.g.* City of Chicago v. Federal Power Commission, 458 F.2d 731, 739 (D.C. Cir. 1971). *See also* Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. Pa. L. Rev. 485, 514 (1970).

> here, they are promulgated by order of the Commission and the expected conformity to them causes injury cognizable by a court of equity, they are appropriately the subject of attack under the provisions of § 402(a) and the Urgent Deficiencies Act." [42]

The Court thus rejected the notion that formal appellation as an "order" should serve as the indispensible talisman of reviewability. Rather, it held that "regulations which affect or determine rights generally even though not directed to any particular person . . . have the force of law and are orders reviewable under the Urgent Deficiencies Act." [43] Eschewing literalism, the Court enunciated the approach that has since guided most judicial determinations of reviewability: "*The particular label placed upon it by the Commission is not necessarily conclusive, for it is the substance of what the Commission has purported to do and has done which is decisive. . . .*" [44]

Fifteen years later, in Frozen Food Express v. United States,[45] the Supreme Court reaffirmed the position taken in *CBS*. The Interstate Commerce Commission had issued an "order" declaring that certain products fell without the statutory exemption from regulation accorded agricultural commodities. The plaintiff, a motor carrier in the business of transporting such commodities, challenged the order. The district court dismissed, on the ground that the "order" was not subject to review. On appeal, the Supreme Court reversed, since in its view the order was "not . . . abstract, theoretical, or academic," and in fact served as "the basis for carriers in ordering and arranging

42. 316 U.S. at 418-19.

43. *Id.* at 417.

44. *Id.* at 416. (Emphasis added) *Cf.* Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic, 400 U.S. 62, 70-71 (1970); City of Chicago v. Federal Power Commission, 458 F.2d 731 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 1074 (1972); National Automatic Laundry and Cleaning Council v. Schultz, 443 F.2d 689, 698 (D.C. Cir. 1971); Medical Committee for Human Rights v. Securities and Exchange Commission, *supra*; Phillips v. Securities and Exchange Commission, 171 F.2d 180, 183 (2d Cir. 1948).

45. 351 U.S. 40 (1956).

their affairs."[46] The crucial barometer of reviewability, asserted the Court, was the "immediate and practical impact" of the agency's action.[47]

That same year, in United States v. Storer Broadcasting Co.,[48] the Court undertook another disquisition on the law of reviewability. The petitioner had sought review in a court of appeals of an "order" of the Federal Communications Commission, pursuant to a special review provision similar in its terms to section 25(a) of the Exchange Act. The order affected an amendation of the "Multiple Ownership Rules," governing corporate relationships among television stations.[49] The Court held the amending order reviewable, relying heavily upon language from its earlier *CBS* opinion.[50] Again the decisive finding was not that the Commission's action had taken the form of an "order," but that "[t]he Rules *now* operate to control the business affairs of Storer."[51]

The foregoing triad—*CBS*, *Frozen Foods*, and *Storer*—has an overarching significance extending well beyond the particular circumstances of the three cases. In light of the continuing dependence on those cases by courts grappling with the question of reviewability, it is fair to say that, today, the views adopted in these three decisions constitute a "rule" of federal administrative law. The rule favors review where the "impact" of agency action is, as in this case, concrete and immediate; it favors elevation of the substance of that action over form, as the proper indicium of reviewability; it counsels a readiness to forego slavish adherence to the literal terms of special review statutes. Chief Justice Stone put it as follows:

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46. *Id.* at 44.

47. *Id.*

48. 351 U.S. 192 (1956).

49. *Id.* at 194.

50. *Id.* at 199.

51. *Id.* (Emphasis added) Significantly, the Court in *Storer* characterized the special review provision, despite its literal restriction to "orders," as "legislation allowing review of the Commission's *actions*." 351 U.S. at 200. (Emphasis added).

> "The ultimate test of reviewability is not to be found in an over-refined technique, but in the need of the review to protect from the irreparable injury threatened in the exceptional case by administrative rulings which attach legal consequences to action taken in advance of other hearings and adjudications that may follow, the results of which the [rulings] purport to control." [52]

Courts confronted with the task of applying section 25(a), or section 24(a) of the Public Utility Holding Company Act,[53] have, for the most part, accorded them a reading which comports with the "rule" of *CBS*.

In American Sumatra Tobacco Corp. v. Securities and Exchange Commission,[54] three corporations objected to the disclosure by the Commission of certain information contained in their registration statements. The Commission, by "order," denied the applications for confidential treatment. The companies then sought review under section 25(a) of the Commission's action. Before the District of Columbia Circuit, the Commission contended that reviewable orders within the contemplation of 25(a) are those entered only after notice, hearing, and upon a finding of facts. That court declined to adopt the Commission's penchant for formalism, holding instead that since the peti-

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52. *Columbia Broadcasting System, supra*, 316 U.S. at 425. *See also* Shapiro: *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 Harv. L. Rev. 92, 942 (1965).

53. 15 U.S.C. §79x(a). Section 24(a) is practically identical in its terms to section 25(a) of The Exchange Act. It provides as follows:

> "Any person or party aggrieved by an order issued by the Commission under this Chapter may obtain review of such order in the United States court of appeals within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia by filing in such court . . . a written petition praying that the order of the Commission be modified or set aside in whole or in part."

The "Commission" adverted to is, of course, the Securities and Exchange Commission.

54. 93 F.2d 236 (D.C. Cir. 1937).

tions "allege[d] irreparable injury," review could be obtained.[55]

The Second Circuit, in Phillips v. Securities and Exchange Commission,[56] considered the scope of section 24(a) of the Public Utility Holding Company Act. The Commission had ordered United, a company in which one petitioner held stock, to cease its existence as a holding company, but stayed the issuance of a dissolution order in view of United's expressed intention to become an investment company. In conjunction with the stay, the Commission stated that United should obtain the approval of a majority of its shareholders before undertaking the transformation of its business. Upon United's request, the Commission issued a "memorandum opinion," this time to the effect that United need not obtain the approval of its preferred shareholders. The Commission also issued a "minute" denying the petitioner's request for a hearing on solicitation material submitted by United, and for a rehearing on the decision not to require inclusion of the preferred shareholders in a vote on the transformation.[57] Neither the "memorandum opinion" nor the "minute" were termed "orders" by the Commission.

Phillips, a United shareholder, sought review of the Commission's actions under 24(a). Inasmuch as final approval of United's transformation awaited further statutory proceedings before the Commission, the Second Circuit deemed the attack on the agency's action premature. But the court made clear that the mere absence of the word "order" was, in itself, no bar to review:

> "We of course agree with the Commission in its concession that the form in which it couched its action is irrelevant beyond showing its own conception of what it had done. It is the substance which must con-

55. *Id.* at 239.

56. 171 F.2d 180 (2d Cir. 1948).

57. 171 F.2d at 181-82.

trol and lack of a formal order will not of itself bar review."[58]

Not surprisingly, this refusal to predicate findings of reviewability upon the presence of a formal "order" was grounded in the Second Circuit's reading of *CBS*.[59]

The District of Columbia Circuit took essentially the same tack with regard to 24(a) in Philadelphia Co. v. Securities and Exchange Commission.[60] Philadelphia, a registered utility company, owned the stock of Pittsburgh Railways, which had filed a petition for reorganization under the Bankruptcy Act. By Commission rule, Pittsburgh had been exempted from the operation of the Holding Company Act while undergoing reorganization. Accordingly, Pittsburgh did not submit for Commission approval its plan of reorganization. Instead, it proceeded with implementation of the plan, under the district court's sole supervision.

With the case in this posture, the Commission amended the rule that had afforded Pittsburgh its exemption from the Holding Company Act. The amendation was effected without a full hearing, and publication of the amendment was not styled an "order" by the Commission.[61] As a consequence of the amendment Pittsburgh lost its exemption, and, by the terms of the Act, was required to submit its reorganization plan to the Commission. Approval could be secured only on condition that there was compliance with certain substantive provisions of the Act.

Philadelphia sought review under 24(a). The statutory provision under which the Commission had proceeded authorized action both by "rules and regulations" and by "order."[62] As in the present case, the Commission opted

58. *Id.*

59. *Id.* at 183.

60. 164 F.2d 889 (D.C. Cir. 1947), *cert. denied*, 338 U.S. 828 (1948).

61. 164 F.2d at 893.

62. Section 19(b) of the Exchange Act of 1934, relied upon by the Commission in the present case, likewise empowers the agency to act by either rule or order.

to move by rule, and, as here, the agency made much of the fact that its action was cast "in general terms."[63] These factors did not sway the District of Columbia Circuit. Relying upon *CBS*, that court said:

> ". . . [N]either the presence nor the absence of a label is controlling . . . . [N]ot even the fact that the action of an administrative agency is phrased to apply generally, or may indeed have general application, is necessarily conclusive that its action is not subject to review as an 'order' . . . under Section 24(a) of the Holding Company Act. If in its impact a 'rule or regulation' applies specifically and affects or determines the rights of a particular person or corporation, then the action of the agency in promulgating it is reviewable even though the 'rule or regulation' is not directed in terms to any particular person or corporation."[64]

The court concluded that the Commission's revocation of Pittsburgh's exemption—an action with an immediate and significant "impact" upon Pittsburgh, Philadelphia, and others—was subject to review.

The precept that emerges from *American Sumatra*, *Phillips*, and *Philadelphia*, that provisions for review of Commission "orders" are not to be read restrictively, reflects the notions of Professor Louis Loss, an acknowledged leader in the securities law field, who served as general counsel to the Commission in its early years:

> "While the Commission's action sought to be reviewed . . . did not even take the *form* of an order, that in itself is of no consequence. Whether there is a reviewable order is a question of substance rather than form."[65]

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63. 164 F.2d at 900. *See* Memorandum in Support of the Securities and Exchange Commission's Motion to Dismiss, at 4.

64. 164 F.2d at 899-900.

65. Loss, Securities Regulation 1140 n.2 (1951 ed.).

Only recently, this distaste for literalism has been reaffirmed by the District of Columbia Circuit. In Medical Committee for Human Rights v. Securities and Exchange Commission,[66] the scope of section 25(a) was again considered. The Medical Committee, a minority shareholder of Dow Chemical, had requested that Dow's management include a certain proposal in its proxy statement. Dow resolutely refused, and the Committee requested Commission review of Dow's action. A division of the Commission sent Dow and the Committee a letter, stating that it would take "no action" concerning Dow's refusal to include the proposal in its proxy material. The full Commission later approved the "no action" recommendation.

The Committee sought review of the agency's action, or inaction, under 25(a), and the Commission "consistently and vigorously urged . . . that [the] court [of appeals] is without jurisdiction. . . ."[67] The court found in neither the legislative history nor in precedent an "unambiguous answer" to the question whether section 25(a) contemplated review of the action taken. Consequently, it resorted to what it styled "general principles and analogies" to settle the matter.[68] After examining the relevant materials on reviewability, the court isolated three considerations it deemed pivotal in any application of section 25(a): first, an ascertainment "whether the administrative action operates with final effect upon a particular individual, entity, or group;"[69] second, a review of the formalities attending the agency action, since "the notion of an 'order' implies *some* formal characteristics;"[70] and that, in consonance with *CBS* and its progeny,

66. 432 F.2d 659 (D.C. Cir. 1970), *vacated as moot*, 404 U.S. 403 (1972).

67. 432 F.2d at 663.

68. *Id.* at 666. As discussed at Note 30, *supra*, the court's point of departure in its application of "general principles" was the presumption of reviewability set forth in *Abbott*.

69. *Id.* at 666.

70. *Id.* at 607 (emphasis added), quoting L. Jaffe, Judicial Control of Administrative Action 419 (1965).

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69. *Id.* at 666.

70. *Id.* at 607 (emphasis added), quoting L. Jaffe, Judicial Control of Administrative Action 419 (1965).

". . . [P]ragmatic considerations, particularly those relating to the institutional relationships between the courts and the administrative agencies, must prevail over purely doctrinal arguments for or against reviewability."[71]

Applying its tripartite test, the court held the Commission's "no action" decision reviewable under section 25(a). The absence of anything formally denominated an "order," though perhaps given some consideration under the court's second analytical principle, did not merit an explicit mention.

It is apparent that the doctrine developed in *CBS* is not confined to questions arising in an identical factual context. Rather, there has emerged from *CBS* a rule of administrative law that pervades consideration of the statutory structure and function of *all* Federal administrative agencies. Like the rule of *Abbott*, the doctrine of *CBS* evinces a strong presumption in favor of review. It serves as a directive to courts to depart from literalism and "over-refined technique"[72] in the construction of statutory review provisions. And, as the foregoing discussion makes clear, courts construing provisions for review of Commission action have consistently declined to adhere to the literal terms of those provisions. Instead, judicial scrutiny has concentrated upon the "substance" and "impact" of Commission action. Where the action taken has, effectively, determined the rights and obligations of a particular person or corporation, and where the impact has been immediate, the action has been deemed reviewable under 25(a).[73]

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71. 432 F.2d at 607.

72. *See* text at Note 52, *supra*.

73. Courts have, of course, held some Commission action unreviewable under section 25(a) and under section 24(a) of the Holding Company Act. Analysis of those instances indicates, however, that non-reviewability is found where the Commission's action is merely of a "procedural" nature. *See, e.g.*, Eastern Utilities Associates v. Securities and Exchange Commission, 162 F.2d 385 (1st Cir. 1947); Todd v. Securities and Exchange Commission, 139 F.2d 701 (6th Cir. 1943); Third Avenue Ry. Co. v. Securities and Exchange Commission, 85 F.2d 915 (2d Cir. 1936).

Viewed in the setting provided by *CBS*, *Frozen Food*, and *Storer*, and against the implementation of the *CBS* principle in cases involving Commission action, the majority's dogged insistence on a literal reading of section 25(a) can fairly be characterized as "restrictive." Keeping in mind the tenets of *Abbott*, it would be justifiable to indulge this proclivity for literalism only in the event that clear, convincing, and unambiguous evidence of Congressional intent to restrict the application of 25(a) to formal "orders" could be produced. The majority is satisfied that perusal of the legislative history "reveals a clear and unequivocal intention to insulate Commission rules or regulations from review under § 25(a)." I think it correct to say that the history of the Exchange Act manifests, at most, Congressional uncertainty as to the scope of that section. In any case, the evidence that may be gleaned from the legislative history falls considerably short of the quantum that would justify limitation of review under 25(a) to formal "orders."

IV.

As the majority points out, the Commission, in promulgating Rule 19b-2, relied upon the authority conferred by section 19(b) of the Exchange Act.[74] That section authorizes the Commission to utilize either "rules or regulations" or "orders" to effect changes in the rules of securities exchanges. Nothing in the statute or the Commission's rules of practice would have precluded promulgation of Rule 19b-2 by "order."

By restricting the availability of review under 25(a) to formal "orders," the majority generates an anomalous state of affairs. For if the Commission may bring about *precisely* the same result by either "rule" or "order," there is vested in the Commission the sole discretion to determine whether action taken pursuant to 19(b) shall be subject to review. Such power is defended by the majority first by reference to the literal terms of sections 19(b) and

74. 15 U.S.C. § 78s(b).

25(a). Second, the majority seeks to cull from the legislative history of the Exchange Act what it considers is clear and convincing evidence of an intent to permit this result. My reading of that history provides no such definitive answer as to Congress' intent in using solely the word "order" in 25(a). Still less does the history support any conclusion that Congress intended to confer on the Commission the sole power to curtail recourse to the courts, merely by affixing a particular label to its actions.

The majority looks first to the remarks of Representative Fish of New York, who, in the House floor debates on the bill that became the Exchange Act, firmly contended that section 19(b) [then numbered 18(b)] should be phrased so as to allow the Commission to act *only* by "order."[75] At that time, 19(b) as drafted permitted the Commission to effect changes in the rules of exchanges by utilizing *only* "rules or regulations."

Admittedly, it was Representative Fish's understanding that the change in statutory language—from "rules or regulations" to "orders"—would "permit recourse to the courts."[76] The Fish amendment was rejected. However, a compromise was later effected in the Senate-House conference, and 19(b) was amended to permit the Commission to move either by "rules or regulations" or "orders."[77] The majority confidently asserts that the compromise "in no way vitiated the Congressional feeling as to the insularity from review under § 25(a) enjoyed by a rule or regulation. . . ." But it is not altogether clear that Representative Fish shared that confidence. Commenting upon the compromise version of the bill, he voiced his satisfaction at the elimination of the "drastic provisions" contained in the earlier House version.[78] Presumably, one

75. *See* 78 Cong. Rec. 8087 (5/4/34).

76. *Id.*

77. *See* 78 Cong. Rec. 10262 (6/1/34) (statement by House managers). The Senate version of the bill that became the Exchange Act had permitted the Commission to act under section 19(b) only by "order." *Id.*

78. 78 Cong. Rec. 10266 (6/1/34).

such "drastic provision" had been the pre-compromise version of 19(b), which in Fish's eyes had foreclosed "any recourse whatever to the courts."[79] The new version, asserted Fish, was "much fairer."[80] There is no evidence on which to base a belief that Fish's new-found contentment was predicated upon the understanding that the Commission could, simply by opting to take action by "rule" instead of "order," insulate that action from review. Rather, it is more plausible to infer that, in Fish's view, Commission action under 19(b) no longer enjoyed such insularity, that "rules," "regulations," and "orders" were coequal with respect to their reviewability. In any case, the effect of the compromise version of 19(b) on Fish's understanding is at least open to question. Consequently, his remarks are a far cry from the "clear and convincing" evidence requisite to a narrow construction of 25(a).[81]

The majority next cites the remarks of Representative Lea, an opponent of the Fish amendment. Lea spoke before the compromise version of 19(b) was adopted, and his words, therefore, refer only to the pre-compromise limitation to "rules or regulations" contained in the House bill. In Lea's view, this limitation was crucial, because it was:

> ". . . important that we shall not give the exchanges the right to appeal . . . from the action of the Commission in making rules and regulations. It would subject the Commission to endless harassment.[82]

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79. 78 Cong. Rec. 8087 (5/4/34).

80. 78 Cong. Rec. 10266 (6/1/34).

81. The majority also quotes the statement of Representative Wadsworth, a supporter of Fish's proposed amendment. Wadsworth stated that the amendment—substitution of "orders" for "rules or regulations"—would afford reviewability "in case of an extreme ruling" by the Commission. 78 Cong. Rec. 8092 (5/4/34). Assuming Wadsworth was as satisfied with the compromise bill as was Fish, there just is no factual basis for concluding that that satisfaction was grounded in the understanding that "extreme rulings" by "rule" were still unreviewable.

82. 78 Cong. Rec. 8090 (5/4/34).

Of course, once the compromise version of 19(b) was adopted by the House-Senate conference, the exchanges *did* have the right to appeal, at least where "rules and regulations" were promulgated by formal "order." Assuming judicial review can properly be termed "harassment," we are without any indication whether Representative Lea felt, after the compromise, that all or only some of the Commission's actions would be subject to such harassment. In short, it is once again unclear to what extent the inclusion of the term "orders" in 19(b) "vitiated" earlier sentiments as to reviewability.

Indeed, it appears that even Representative Lea comprehended that "quasi-judicial" action by the Commission was, in any event, always subject to review. His feeling that "rules" were generally *not* reviewable was based on the supposition that rulemaking is, typically, a "quasi-legislative" function.[83] However, he openly adverted to the fact that the Commission might take quasi-judicial action in the guise of a "rule." Lea seemed to have no doubt that such action would be reviewable:

> "There would be a quasi-judicial power, perhaps if under a rule the Commission should attempt to determine whether an alleged guilty man should be penalized or subjected to a fine. *That the exercise of quasi-judicial power over the exchange would give it the right to go to court.* The exchange would not have the right to claim the attention of the court *until it claims to be injured by the Commission.*"[84]

Apparently Representative Lea was of the impression that "injury" to particular persons would rarely, if ever, result from the issuance of "rules," that a clear line demarcated the boundary between the "adjudicative" and "legislative" functions of administrative agencies. Today

83. 78 Cong. Rec. 8091 (5/4/34).

84. *Id.* (Emphasis added.)

we know otherwise.[85] We know, for example, that "rules," like adjudicative "orders," often determine rights and obligations, that they may have the "force of law" and give rise to "irreparable injury."[86] Thus, if we are to take Lea's remarks at face value, it appears that he might well have agreed that even the original House version of 19(b), allowing action only by rule, could give rise to much more reviewable action than he had at first thought. Again, the inferences that can fairly be drawn from Lea's remarks concerning reviewability of Commission action are of less than univocal significance.

The statements of Representative Rayburn quoted by the majority hardly provide more clarity concerning Congress' understanding. His remark that Commission "orders" would become "tied up in the courts"[87] antedated adoption of the compromise version of section 19(b). After that adoption, of course, "rules and regulations [issued] in the form of orders"[88] *could* be so "tied up." It may be taking undue license to impute to Mr. Rayburn, as the majority does, the converse thought that "orders" issued in the from of "rules" could *not* be appealed.

Mr. Rayburn did feel, as the majority admits, that review would be available if "the Commission exceeded its jurisdiction and its authority under the Act."[89] The petitioners contend that this is precisely what has transpired

85. *See* City of Chicago v. Federal Power Commission, 458 F.2d 731, 739 (D.C. Cir. 1971):

> "In many cases it is unnecessary, and even unwise, to classify a given proceeding as either adjudicatory or rulemaking. The line between the two is frequently a thin one and resolution of a given problem will rarely turn wholly on whether the proceeding is placed in one category or another."

Cf. Duquesne Light Company v. Environmental Protection Agency, Nos. 72-1542, 72-1543 (3d Cir., Filed June 5, 1973), slip opinion at p. 8.

See generally Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 Harv. L. Rev. 921 (1965).

86. Columbia Broadcasting System v. United States, *supra*, 316 U.S. at 418.

87. 78 Cong. Rec. 8093 (5/1/34).

88. *Id.*

89. 78 Cong. Rec. 8091 (5/1/34).

in the promulgation of Rule 19b-2. While this isolated remark of Rayburn's is inconclusive, it at least injects a further note of equivocation into his understanding concerning the reviewability of action taken pursuant to 19(b).

The plain fact is that the paucity of legislative comment on the amended version of 19(b) once more furnishes no clear idea of Congress' final understanding as to availability of judicial review.[90]

In this connection, the majority attempts to make much out of a colloquy before the Senate Committee on Banking and Currency, concerning section 25(a) (section 24(a) in the bill). The New York Stock Exchange had proposed that the section be drafted to read as follows:

> "Any person aggrieved by an order issued by the Commission in a proceeding under this Act to which such person is a party and any *person* aggrieved by *any rules or regulations of general applications* made effective as prescribed in section 20 may obtain a review of such order."[91]

Senator Barkley expressed his dismay at the proposal, which would in his view "make it possible for *anybody* to go into court and make a general attack."[92] Indeed, the proposed language would seem to permit such an attack, extending review as it did to any "person," whether or not that person was a "party" to the rulemaking "proceed-

90. If the Commission's promulgation of Rule 19b-2 is reviewable in the district court under the Administrative Procedure Act (see *Abbott Laboratories, supra*), a conclusion that that action is also reviewable here under section 25(a) would only serve to expedite the review process. Such expedition, it is submitted, might alleviate somewhat the expressed fears over "tying up" Commission action in the courts. See the remarks of Representative Lea, 78 Cong. Rec. 8090 (5/1/34), and of Representative Rayburn, 78 Cong. Rec. 8093 (5/1/34), quoted *supra*.

At least one member of Congress has recognized that special statutory review provisions such as section 25(a) were generally intended to "save time." *See* Administrative Procedure Act: Legislative History 388 (remarks of Representative Bennett in the House, May 24, 1946) (G.P.O. ed., 1946).

91. Hearing on S. Res. 84, S. Res. 56, and S. Res. 97 before the Senate Committee on Banking and Currency, 72d Cong., 2d Sess., and 73d Cong., 1st and 2d Sess. (1934) at 7569. (Emphasis added)

92. Id. at 7571. (Emphasis added)

ing." The final version of 25(a), of course, is not that broad in its terms: review is restricted to "parties" to formal "proceedings." Thus Senator Barkley's misgivings, generated by a proposal much broader in impact than the reading contended for by the petitioners in this case, add little to an understanding as to when a party to a proceeding may obtain appellate review.

Inspection of the scant history available does not, of course, permit one to say with assurance that Congress fully intended the word "order" in 25(a) to be taken to include "rules or regulations." Thus, in an ordinary case of statutory construction a reasonable argument to the effect that 25(a) is to be read restrictively could, perhaps, be hinged upon the slender quantum of evidence we have before us. But judicial construction of a provision for review of agency action is no "ordinary" case. Rather, we must pay close heed to the strictures of the Administrative Procedure Act, and to the Supreme Court's teachings in *Abbott*, and demand a stronger showing of Congressional intent. This is particularly so where the reading contended for is a restrictive one, one which, if implemented, would tend to preclude the availability of review. Since the Commission and the majority would adhere to the literal terms of 25(a)—and inasmuch as that adherence is, when contrasted to the clear trend of thought in administrative law, properly styled "restrictive"—they must shoulder this heavier burden. They must, in short, show by clear, convincing, and unambiguous evidence Congress' intent to so restrict the application of the statute. This, I respectfully suggest, they have failed to do.

It is interesting to note that, only recently, members of the Commission itself have expressed doubt whether action taken pursuant to 19(b) may be insulated from review. Speaking before a Senate subcommittee,[93] former Chairman Casey expounded his conception of the nature of a

93. Hearings on S. 1164 and S. 3347 before the Senate Subcommittee on Securities of the Committee on Banking, Housing and Urban Affairs, 92d Cong., 2d Sess. (1972), pp. 287-290.

19(b) proceeding, in response to a query put by Senator Williams:

> "The procedure is to formulate an exchange rule, request the exchange to adopt it.
>
> "If the exchange is unwilling to adopt it, then you call a hearing . . . at the end of which the Commission would make a determination *which would be appealable to the courts.*" [94]

Commissioner Loomis evinced less certainty as to the reviewability of action taken under section 19(b):

> "[Section] 19(b) is completely silent on the subject of judicial review of a 19(b) proceeding. It doesn't mention it. In fact, former Speaker Rayburn stated on the floor of the House in 1934 that there would be no judicial review of a 19(b) proceeding, but I suspect the passage of the Administrative Procedure Act may have changed that." [95]

The views of the two Commission members, though somewhat divergent and certainly not conclusive, do indicate that those vitally interested in discerning Congress' precise intent as to the reviewability of Commission action have been unable to weave from the fibers of the legislative materials anything approaching a level of "clear and convincing" evidence. In the absence of such evidence, resort must be had to general principles, to precedent, and to common sense to settle the issue. We should look, in short, not to the label affixed to Rule 19b-2 by the Commission, but to the impact of that rule upon petitioners. If that impact is found to be substantial, concrete, and immediate, a court of appeals should assume jurisdiction under 25(a).

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94. *Id.* at 288. (Emphasis added)

95. *Id.* at 290.

V.

The factual circumstances of this case make abundantly clear that Rule 19b-2 will have a material impact upon both PBW and the other petitioners. At the same time, it cannot be denied that the rule is of somewhat "general" application; that others—albeit very few—besides these petitioners will feel its effects. Yet, as a review of the pertinent cases has shown, the generality that inheres in "rules" has no magical significance. The Supreme Court in *CBS* took pains to emphasize that the concededly "legislative" character of action taken pursuant to a rule-making power does not, of itself, bar the door to review. Consequently, the application of 25(a) to this case must not stop at the point where the quasi-legislative nature of Rule 19b-2 is established. Rather, the practical effect of the rule is the lodestar by which we must navigate. Where, as here, such an effect can be shown, and where there is no legislated compulsion to honor only the literal terms of the statute, a "rule" is no less subject to review under 25(a) than is an "order."

It is not unrealistic to assume that petitioners, though vigorously opposed to the adoption of Rule 19b-2, will conform their activity to the strictures of the rule rather than disobey and risk subjection to enforcement proceedings. Thus, the rule has the "force of law before [its] sanctions are invoked," and "conformity to [it will cause] injury."[96] Both PBW and the petitioner-brokers will find their business affairs—perhaps their very existence—"controlled" by the rule.[97] Nor is this prospect remote. The rule requires institutional members to file with the exchanges, within 30 days of the rule's effective date, statements of their intention to comply. Thus, in substance—and "sub-

96. Columbia Broadcasting System, Inc. v. United States, *supra*, 316 U.S. at 418.

97. *See* United States v. Storer Broadcasting Company, *supra*, 351 U.S. at 199.

stance" is the focal point of our inquiry[98]—the Commission's action is of such immediate and concrete significance that we should proceed to hear the merits of petitioners' claims.

As has been shown, the pragmatic considerations to which our attention is directed by *CBS*, *Medical Committee for Human Rights*, and other cases, strongly suggest that jurisdiction under 25(a) rests in this Court to review the promulgation of Rule 19b-2. The applicable authorities also indicate that the majority's insistence on a narrow reading of the statute is misguided; this case lends substance to the adage that "there is no surer way to misread a document than to read it literally."[99]

Our jurisprudence, at least insofar as it has contemplated the reviewability of administrative action, has long abandoned the apotheosis of form. Once it can be shown that administrative action constitutes, at least as to some persons, an effective determination of rights and liabilities, the precise form in which that action is couched is no longer determinative.

Of course, if Congress chooses to be ungenerous in conferring jurisdiction to review agency action, such is its prerogative. Congress, in short, has the power to elevate form over substance. But as the Supreme Court pointed out in *Abbott*, courts are never to *presume* Congressional parsimony. Absent clear and convincing proof, we may conclude only that Commission action having the impact Rule 19b-2 will have on these petitioners is subject to review within the terms of section 25(a).

My approach to this case does not proceed from any special solicitude for these petitioners nor, certainly, from any conviction that each and every facet of governmental activity vests in those affected, *eo instante*, rights to judi-

98. *See* Columbia Broadcasting System v. United States, *supra*, 316 U.S. at 416; Phillips v. Securities and Exchange Commission, *supra*, 171 F.2d at 182; Philadelphia Co. v. Securities and Exchange Commission, *supra*, 164 F.2d at 899.

99. Giuseppi v. Walling, 144 F.2d 609, 624 (2d Cir. 1944) (L. Hand, J., concurring).

cial review.[100] Rather, it is impelled by a recognition that the announcement of definitive regulatory policy may be, to the layman affected, "the last expression of the law on the case."[101] Where this *de facto* finality attaches, that is, where rights and liabilities of particular persons are determined by administrative action, our law generally provides for judicial superintendence. Congress may, within constitutional limits, stipulate otherwise. But ordinarily judicial superintendence is heralded as a "right," and an intention to preclude it, or to stay its availability, is not lightly to be inferred.[102] And this would seem particularly so when more and more of the social and economic aspects of life are being governed by agency action.

Another court has concluded that review of Commission action in a court of appeals under 25(a) is to be preferred to district court review only where a clear and formal evidentiary record already exists.[103] Resolution of the questions raised by these petitions—all legal in nature—can probably be achieved without resort to *any* fact-finding machinery. In addition, while the superiority of the fact-finding apparatus of a district court may be conceded, section 25(a) empowers a court of appeals to remand a case to the Commission for an evidentiary record if such were to become appropriate. Thus, district court review and review here create at least an "equal inconvenience" for the Commission;[104] the expedition provided for by the mechanism of 25(a) will likely create *less* inconvenience for all involved. In these circumstances,

100. *Cf.* Bohlen v. Weinberger, No. 72-1884 (3d Cir., filed Aug. 15, 1973) slip opinion at 9 (Aldisert, J., dissenting).

101. Llewellyn, Jurisprudence: Realism in Theory and Practice 30 (1962).

102. *See* Jaffe, Judicial Control of Administrative Action 346, 357 (1965). *Cf.* National Automatic Laundry and Cleaning Council v. Schultz, *supra*, 443 F.2d at 696.

103. Independent Broker-Dealers' Trade Ass'n v. Securities and Exchange Commission, *supra*, 442 F.2d at 143.

104. American Sumatra Tobacco Co. v. Securities and Exchange Commission, 93 F.2d 236, 241 (1937). *See also* Medical Committee for Human Rights v. Securities and Exchange Commission, *supra*, 432 F.2d at 672.

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104. American Sumatra Tobacco Co. v. Securities and Exchange Commission, 93 F.2d 236, 241 (1937). *See also* Medical Committee for Human Rights v. Securities and Exchange Commission, *supra*, 432 F.2d at 672.

where the special competence of the district court would avail nothing, there remains no reason for concluding that this Court should decline consideration of petitioners' contentions.

Unlike the majority, I would hold that we do have jurisdiction to consider the important questions framed by these petitions.

A True Copy:

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Clerk of the United States Court of Appeals for the Third Circuit.

(A.O.—U. S. Courts, International Printing Co., Phila., Pa.)

APPENDIX B.

Securities Exchange Act Rule 19b-2. Utilization of Exchange Memberships for Public Purposes.

(a) Except as otherwise provided in subsection (c) of this Rule, each securities exchange registered with the Commission shall, by rule, require every member of such exchange to have as the principal purpose of its membership the conduct of a public securities business. A member shall be deemed to have such a purpose if at least 80 percent of the value of exchange securities transactions effected by it during the preceding six calendar months, whether as a broker or dealer, is effected for or with persons other than affiliated persons or is effected pursuant to transactions of the kind described below:

(1) any transaction by a registered specialist in a security in which he is so registered;

(2) any transaction for the account of an odd-lot dealer in a security in which he is so registered;

(3) any transaction by a block positioner acting as such, except where an affiliated person is a party to the transaction;

(4) any stabilizing transaction effected in compliance with Rule 10b-7 under the Securities Exchange Act of 1934 to facilitate a distribution of a security in which the member effecting such transaction is participating;

(5) any bona fide arbitrage transaction, including hedging between an equity security and a security entitling the holder to acquire such equity security, or any risk arbitrage transaction in connection with a

merger, acquisition, tender offer or similar transaction involving a recapitalization;

(6) any transaction effected in conformity with a plan designed to eliminate floor trading activities which are not beneficial to the market, which plan has been adopted by the exchange and declared effective by the Commission;

(7) any transaction made with the prior approval of a floor official to permit the member effecting such transaction to contribute to the maintenance of a fair and orderly market, or any purchase or sale to reverse any such transaction; or

(8) any transaction to offset a transaction made in error.

(b) For purposes of this Rule, an "affiliated person" of a member shall include

(1) any person directly or indirectly controlling, controlled by or under common control with such member, whether by contractual arrangement or otherwise, provided that the right to exercise investment discretion with respect to an account, without more, shall not constitute control;

(2) any principal officer, stockholder or partner of such member or any person in whose account such person has a direct or material indirect beneficial interest; and

(3) any investment company of which such member, or any person controlling, controlled by or under common control with such member, is an investment adviser within the meaning of the Investment Company Act of 1940.

A person shall be presumed to control another person, for purposes of this Rule, if such person has a right to participate to the extent of more than 25 percent in the profits of such other person or owns beneficially, directly or indirectly, more than 25 percent of the outstanding voting securities of such person.

The principal officers of a member include the president, executive vice-president, treasurer, secretary or any other person performing a similar function for an incorporated or unincorporated organization. A principal stockholder or partner of a member is any natural person actively engaged in the business of the member and beneficially owning, directly or indirectly, more than five percent of the outstanding voting securities of a member organization or having the right to participate to the extent of more than five percent in the profits of such person.

(c) Each exchange shall provide in its rules adopted pursuant to subsection (a) of this Rule that any member of such exchange who does not comply with the requirements of such exchange rule, and who acquired membership on such exchange prior to the date of the adoption of this Rule, shall nevertheless be presumed, for a period not to exceed three years following the date of the adoption of this Rule, to have, as the principal purpose of its membership, the conduct of a public securities business, if

(1) within 30 days after the date of the adoption of such exchange rule, such member shall furnish a written commitment to such exchange to make good faith efforts to comply with the requirements of such exchange rule, accompanied by a written plan setting forth in detail those steps such member intends to take to comply with such requirements; and

(2) prior to the expiration of each of the first two one-year periods immediately following the date of the

adoption of this Rule, such member shall file with such exchange a statement, setting forth the steps which have been taken leading toward compliance with the requirements of such exchange rule, together with an updated plan, specifying all further action such member intends to take to achieve such compliance.

No plan filed pursuant to such exchange rule shall be deemed to satisfy the requirements of such exchange rule unless the plan has been declared effective by the exchange with which it is filed after the exchange has first reviewed the plan and determined that it is reasonably calculated to enable such member to comply with the requirements of such exchange rule within three years from the date of the adoption of this Rule.

(d) The failure of an exchange diligently and effectively to enforce any provision of a rule adopted by it pursuant to this Rule, or to require diligent compliance by any of its members with the terms of an effective plan filed by such member with that exchange pursuant to subsection (c) of this Rule, shall constitute a violation of this Rule.

APPENDIX C.

SECURITIES AND EXCHANGE ACT OF 1934.
Section 19(b), 15 U. S. C. § 78s(b).

(b) The Commission is further authorized, if after making appropriate request in writing to a national securities exchange that such exchange effect on its own behalf specified changes in its rules and practices, and after appropriate notice and opporunity for hearing, the Commission determines that such exchange has not made the changes so requested, and that such changes are necessary or appropriate for the protection of investors or to insure fair dealing in securities traded in upon such exchange or to insure fair administration of such exchange, by rules or regulations or by order to alter or supplement the rules of such exchange (insofar as necessary or appropriate to effect such changes) in respect of such matters as (1) safeguards in respect of the financial responsibility of members and adequate provision against the evasion of financial responsibility through the use of corporate forms or special partnerships; (2) the limitation or prohibition of the registration or trading in any security within a specified period after the issuance or primary distribution thereof; (3) the listing or striking from listing of any security; (4) hours of trading; (5) the manner, method, and place of soliciting business; (6) fictitious or numbered accounts; (7) the time and method of making settlements, payments, and deliveries and of closing accounts; (8) the reporting of transactions on the exchange and upon tickers maintained by or with the consent of the exchange, including the method of reporting short sales, stopped sales, sales of securities of issuers in default, bankruptcy or receivership, and sales involving other special circumstances; (9) the fixing of reasonable rates of commission, interest, listing, and other

charges; (10) minimum units of trading; (11) odd-lot purchases and sales; (12) minimum deposits on margin accounts; and (13) similar matters.

Section 25, 15 U. S. C. § 78y.
Court Review of Orders.

SECTION 25. (a) Any person aggrieved by an order issued by the Commission in a proceeding under this title to which such person is a party may obtain a review of such order in the Court of Appeals of the United States, within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall be forthwith transmitted by the clerk of the court to any member of the Commission, and thereupon the Commission shall file in the court the record upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record shall be exclusive, to affirm, modify, and enforce or set aside such order, in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the hearing before the Commission, the court may order such addi-

tional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, and enforcing or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

ADMINISTRATIVE PROCEDURE ACT.
Section 10, 5 U. S. C. §§ 702-04.

§ 702. Right of review.

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

§ 703. Form and venue of proceeding.

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

§ 704. Actions reviewable.

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

SUPREME COURT

JAN 31 1974

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1134

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CONNECTICUT NUTMEG SECURITIES, INC.,
and
ROBERT I. BERDON as Treasurer of the State of
Connecticut, and President of
CONNECTICUT NUTMEG SECURITIES, INC., *Petitioners*

v.

SECURITIES AND EXCHANGE COMMISSION, *Respondent*

BRIEF OF THE AMERICAN INSURANCE ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

WILLIAM E. MILLER
HENRY G. IKENBERRY
1250 Connecticut Avenue
Washington, D.C. 20036

Attorneys for the American Insurance Association

Of Counsel:

STEPTOE & JOHNSON
1250 Connecticut Avenue
Washington, D.C. 20036

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INTEREST OF THE AMICUS CURIAE [1]

The American Insurance Association (hereinafter "AIA") is a national organization of approximately 126 companies that sell property and casualty insurance throughout the United States.

[1] All of the parties have given their written consent to the filing of this brief.

A significant portion of the assets of member [2] and non-member property and casualty companies has been and continues to be in common stock. [3] Those equity investments, made in conformity with state laws and regulations, provide the requisite liquidity and protection against inflation that enables such companies to insure safely against a wide variety of risks.

The proposed S.E.C. Rule 19b-2 (hereinafter the "80 20 rule") would seriously affect the manner in which such companies manage those investments. A significant number of AIA member affiliated companies have already become members of regional exchanges and have assumed the normal capital costs and responsibilities of exchange members. It is expected that others would follow a similar course of action. Such membership results in significant cost savings in the execution of common stock transactions since, under the present fixed minimum commission rate schedule, exchange members are afforded lower commission rates than non-members.

The adoption of the 80 20 Rule by the S.E.C. with its requirement that brokers conduct 80% of their business with unaffiliated customers, would effectively preclude the continued operation of these company-affiliated brokers. The result would be a more costly method of conducting stock transactions. That increased cost would necessarily have an impact on the cost of insurance to the public.

---

[2] AIA member companies manage approximately $28 billion in assets.

[3] In 1971, the amount of common stock held by all property and causalty insurance companies was over $15.5 billion.

The AIA, which has actively participated in this matter before the S.E.C. and has filed a brief as *amicus curiae* in the Court below, appears herein on behalf of those members who are already exchange members as well as those members who may want to assume similar responsibilities in the future for the same reasons. Accordingly, AIA has a vital interest in urging this Court to grant the petition for certiorari.

ARGUMENT

A. The Decision of the Court Below that Quasi-Adjudicatory Administrative Action Is Not Reviewable Under Section 25(a) Conflicts with the Standards for Review of Administrative Action Established by This Court

The Court below, after consideration of this Court's principal decisions determining the availability of review of quasi-adjudicatory administrative actions concluded that:

> The thrust of each of them (the Supreme Court Decisions) is that courts should carefully scrutinize the statute and its history to determine the intendment of Congress as manifested in the terms of the statute. Such an examination convinces us that Congress intended to withhold the type of review here sought by petitioners.

The intendment of a statutory provision for judicial review is an obviously desirable and relevant consideration, but where, as here, there is no clear legislative history and the "rule" takes on the characteristic of an "order", it is the substance rather than the form which determines the appropriate forum for review.[4]

[4] In considering the question of the availability of judicial review, this Court has clearly indicated that there must be a presumption in favor of such review. *Abbott Laboratories* v. *Gardner*, 387 U.S. 134 (1967).

This Court in the principal case in this area, *Columbia Broadcasting System Inc.* v. *United States*, 316 U.S. 407 (1941) [5], held that "the particular label placed upon [the Federal Communications Commission action] . . . is not necessarily conclusive, for it is the substance of what the Commission has purported to do and has done which is decisive." The Commission had, in *CBS*, issued regulations designed to control certain contractual relations between broadcasting networks and their affiliated stations. The document promulgating those regulations was designated an "order", but was described by the Commission as "the expression of general policy we will follow in exercising our licensing power." *Id.* at 411. This Court in concluding that the agency action was reviewable under a statutory provision permitting review of certain "orders" rested its holding not solely on the presence of the agency's implementing "order" but also on the basis that the regulations, viewed as regulations, were reviewable. [6] It held that "regulations which affect or determine rights generally even though not directed to any particular person . . . have the force of law and are orders reviewable under the Urgent Deficiencies Act." *Id.* at 417.

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[5] It should be noted that the case principally relied upon by the Court below, *A.F. of L.* v. *NLRB*, 308 U.S. 401 (1940) was cited by this Court in *Columbia Broadcasting System* v. *United States*, *supra*, at 419-420 as lending some support to the proposition that an "argument addressed to the form rather than the substance of the order (is to be) rejected."

[6] "When, as here, (the regulations) are promulgated by order of the Commission and the expected conformity to them causes injury cognizable by a court of equity, they are appropriately the subject of attack under the provisions of § 402(a) and the Urgent Deficiencies Act." *Id.* at 418-19.

This approach to judicial review was reiterated in *Frozen Food Express* v. *United States*, 351 U.S. 40 (1956), where the Interstate Commerce Commission had issued an "order" declaring certain products as not exempt from regulation. When a motor carrier in the business of transporting such commodities challenged the I.C.C. order, the government successfully moved to dismiss the action in the District Court on the grounds that there was no "order" as required by the statutory provisions for judicial review. This Court reversed that decision holding that the agency action which was "not . . . abstract, theoretical, or academic" and which served as "the basis for carriers in ordering and arranging their affairs"[7] was just such an order as contemplated in the statutory provisions for review.

The critical factor of reviewability was, as in this case, the "immediate and practical impact" of the agency's action.

Similarly, in *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, 200 (1956) an FCC "order" amending the Multiple Ownership Rules governing corporate relationships among television stations was held to be reviewable because that action resulted in "[t]he Rules now operat[ing] to control the business affairs of Storer."

Rule 19b-2 was clearly aimed at institutional membership and at the PBW Stock Exchange. Its effect is to prevent PBW from retaining a vital part of its membership. Institutional members presently account for 35% of the trading volume of the PBW Exchange and for 43% of its revenues. The effect of the

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[7] *Frozen Food Express* v. *United States*, *supra*, at 44.

rule on some members of the AIA who are also members of the PBW Exchange will be to deprive them of the chance to save millions of dollars in brokerage commissions. This will necessarily have an impact on the cost of insurance to the public. As it is clear that the principal thrust and the aerual force and intent of Rule 19b-2 as promulgated, is the regulation of a limited segment of the investment community and as the impact of that rule is at least as direct and material as the impact involved in the agency actions of *CBS, Storer* and *Frozen Food,* the decision of the Court below is clearly in error.

The attempted distinction of this case from *CBS, Storer* and *Frozen Food* undertaken by the Court below, on the basis that each of those cases involved rulemaking proceedings implemented by an order is singularly unconvincing. Such a distinction undermines the reasoning at the base of each case that it is not the label or the arbitrary characterizations which govern the availability of review of agency orders, but rather the direct and substantive impact of the action itself.

B. The Decision of the Court Below Is in Conflict with Decisions of the Court of Appeals for the District of Columbia Circuit

The Court of Appeals for the District of Columbia has decided several cases involving the issues of reviewability of agency action similar to those presented in the instant case. In addition to matters involving other administrative agencies such as the Civil Aeronautics Board [8] and the Federal Power Commission [9]

[8] *Deutsche Lufthansa Aktiengesellschaft* v. *Civil Aeronautics Board*, 479 F.2d 912 (D.C. Cir. 1973).

[9] *City of Chicago, Illinois* v. *Federal Power Commission*, 458 F.2d 731 (D.C. Cir. 1971) *cert. denied*, 405 U.S. 1074 (1972).

there have been two cases of particular interest and applicability.

The first of these is *Medical Commission for Human Rights* v. *Securities and Exchange Commission,* 432 F.2d 659 (D.C. Cir. 1970) vacated as moot 404 U.S. 403 (1972). The Court of Appeals in that case considered the applicability of Section 25(a) to the agency's refusal (in a "no-action" letter) to require the inclusion of a proposal in a proxy statement. The absence of an "order" did not deter the Court from concluding that review under Section 25(a) was appropriate. That conclusion was premised upon several factors, the most important of which appear to have been the absence of any legislative history indicating a clear intent to preclude such review, the practical impact of the agency action on the petitioner and the general presumption of reviewability of administrative action set out by this Court in *Abbott Laboratories* v. *Gardner,* 387 U.S. 136 (1967).

In the second case, *Philadelphia Company* v. *Securities and Exchange Commission,* 164 F.2d 889 (D.C. Cir. 1947) *cert. denied,* 333 U.S. 828 (1948), the Court addressed the reviewability of SEC action under Section 24(a) of the Public Utility Holding Company Act; identical to Section 25(a) of the Exchange Act. The SEC had amended certain of its rules with the resultant effect of revoking the petitioner's exemption from the provisions of that Act. The action was challenged under the statutory provisions providing for review of an SEC "order". In relying upon the rationale of this Court in *CBS* the Court looked to the practical effect of the agency action and upheld the availability of direct appellate review.

CONCLUSION

The decision of the Court below is in conflict with prior decisions of this Court and with decisions of another circuit. The issue is one of significant legal importance and should be decided by this Court.

Respectfully submitted,

WILLIAM E. MILLER
HENRY C. IKENBERRY
1250 Connecticut Avenue
Washington, D.C. 20036

Attorneys for the American Insurance Association

Of Counsel:

STEPTOE & JOHNSON
1250 Connecticut Avenue
Washington, D.C. 20036

SUPREME COURT

APR 11

MICHAEL RODAK, JR.

No. 73-1134

In the Supreme Court of the United States

OCTOBER TERM, 1973

PBW STOCK EXCHANGE, INC., ET AL., PETITIONERS

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

LAWRENCE E. NERHEIM,
General Counsel,
DAVID FERBER,
Solicitor,
HARVEY L. PITT,
Special Counsel,
MARTIN S. BERGLAS,
Attorney,
Securities and Exchange Commission,
Washington, D.C. 20549.

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In the Supreme Court of the United States

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A)[1] is reported at 485 F. 2d 718.

JURISDICTION

The judgment of the court of appeals, granting the motion of the Securities and Exchange Commission ("Commission") to dismiss the petitions for review for lack of jurisdiction, was entered on September 28, 1973. A petition for rehearing *en banc* was denied on

[1] References to the Appendices annexed to the petition for a writ of certiorari are cited as "Pet. App." References to the petition are cited as "Pet."

October 31, 1973. The petition for a writ of certiorari was filed on January 21, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a rule promulgated by the Securities and Exchange Commission establishing new standards for utilization of securities exchange memberships, which is applicable to all national securities exchanges, to the more than 5,000 persons holding memberships on those exchanges and to any and all future members of such exchanges, is directly reviewable in a court of appeals, pursuant to a statutory provision for review of Commission orders.

STATUTES INVOLVED

Sections 2, 6, 11, 17(a) and 23(a) of the Securities Exchange Act of 1934, as amended, 15 U.S.C. 78b, 78f, 78k, 78q(a) and 78w(a), are set forth at pages 19–26, *infra*. Sections 19(b) and 25(a) of the Securities Exchange Act, 15 U.S.C. 78s(b) and 78y(a), and Section 10 of the Administrative Procedure Act, as codified, 5 U.S.C. 702–704, are set forth at Pet. App. C.

STATEMENT

1. On January 16, 1973, the Commission adopted Securities Exchange Act Rule 19b–2, 17 C.F.R. 240. 19b–2, pursuant to its authority under Sections 2, 6, 11, 17, 19 and 23 of the Securities Exchange Act.[2]

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[2] The Commission announced the adoption of Rule 19b–2 in Securities Exchange Act Release No. 9950 (Jan. 16, 1973) ("Release"), 38 Fed. Reg. 3901 (Feb. 8, 1973), copies of which are being lodged with this Court.

As both the majority and dissenting opinions below found,[3] Rule 19b–2, on its face and by its explicit terms, establishes new standards for the utilization of exchange memberships and is applicable to all national securities exchanges registered with the Commission,[4] to the more than 5,000 persons holding memberships on those exchanges, and to any and all future members of those exchanges.

The PBW Stock Exchange, Inc. ("PBW") and certain of its members sought review of Rule 19b–2 in the court of appeals pursuant to Section 25(a) of the Securities Exchange Act and the judicial review provisions of the Administrative Procedure Act, as codified at 5 U.S.C. 702–706. The court granted the Commission's motion to dismiss the petitions for lack of jurisdiction on the grounds that Section 25(a) authorizes direct appellate review only of the Commission's quasi-judicial orders,[5] and that the Administrative Procedure Act does not contain any separate grant of authority permitting direct appellate, as opposed to district court, review of quasi-legislative rulemaking.[6] It expressly refused to foreclose any rights the petitioners might have to pre-enforcement or other district court review of Rule 19b–2.[7]

2. Prior to the adoption of Rule 19b–2, the various national securities exchanges followed differing and inconsistent policies concerning the appropriate utili-

[3] See, *e.g.*, Pet. App. A, pp. 4, 5, 27, 28, 33, n. 9, 59.

[4] There are 13 exchanges registered with the Commission pursuant to Section 6 of the Securities Exchange Act.

[5] Pet. App. A, pp. 7–8. See, also, *id.*, at pp. 10–16.

[6] *Id.*, at p. 6.

[7] *Id.*, at pp. 7 n. 3, 29–30.

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zation of exchange memberships, resulting, among other things, in the fragmentation of securities markets for exchange-listed securities.[8] Some exchanges including, to some degree, the PBW,[9] refused to permit brokers and dealers affiliated with certain financial institutions (such as banks, for example) to obtain membership on the exchange, without regard to the purpose for which such membership might have been sought—the so-called "parent test."[10] On the other hand, a number of the exchanges, including the PBW, permitted most persons or entities to obtain exchange memberships, to the extent these were available,[11] even though these memberships might be utilized solely, or primarily, for the benefit of the member or its affiliate, and not for the benefit of the investing public generally.

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[8] See, *e.g.*, Hearings before the Subcommittee on Commerce and Finance of the House Committee on Interstate and Foreign Commerce, on Study of the Securities Industry, Part 6, 92d Cong., 2d Sess. 2962–2963. It was there shown that as a result, for example, an offer of securities at a particular price in one market might not be accepted at that price, even though there was an outstanding bid at that price in another market in which the same securities were traded.

[9] PBW Stock Exchange Constitution, Art. XIV, Sec. 3, CCH. *PBW Stock Exchange Guild*, ¶ 1328, p. 1093.

[10] See, *e.g.*, 2 CCH. *New York Stock Exchange Guide*, ¶ 2318. The "parent test" required that the "parent" of any exchange member have as its primary purpose the transaction of business as a broker or dealer in securities. See, also, Release, at pp. 90–96.

[11] The constitutions of the various exchanges limit the total number of memberships available, as this Court has recognized might be proper under the Securities Exchange Act. *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 349–350.

Rule 19b–2 is a product of extensive studies by the Commission of the structure, viability and fairness of the nation's securities markets. These are summarized in the Release (pp. 10–36) adopting the Rule. They included a detailed inquiry into the practices of exchanges in fixing minimum commission rates for their members to charge, a major study to determine the effect of institutional investors upon the fairness, orderliness and honesty of the securities markets, and a probing analysis of the structure of the markets. They led to the issuance by the Commission of a *Statement on the Future Structure of the Securities Markets,*[12] committing the Commission to a program of upgrading competition in the securities industry and otherwise implementing the concept, enumerated by the Congress that enacted the Securities Exchange Act [13] and recognized by this Court in *Silver* v. *New York Stock Exchange,*[14] that exchange memberships should be utilized for public, and not private, purposes. Pursuant to that program the Commission, in May 1972,[15] requested all registered exchanges to adopt, no later than July 31, 1972, the substance of a proposed rule governing the appropriate utilization of exchange memberships.[16] On August 3,

[12] G.P.O. ed., Feb. 2, 1972.

[13] H. Rep. No. 1383, 73d Cong., 2d Sess. 15.

[14] 373 U.S. at 349.

[15] Securities Exchange Act Release No. 9623 (May 30, 1972).

[16] While the Commission relied upon its broad authority under Securities Exchange Act Sections 2, 6, 11, 17 and 23, to adopt rules governing trading by exchange members, it nevertheless denominated its rule "Rule 19b–2," relying on Section 19(b) for additional authority to act, and utilizing the procedures called for by that section, to make clear its view that the concept of

(Continued)

1972, after it had become apparent that most of the exchanges had not adopted the rule,[17] the Commission published proposed Rule 19b–2 for public comment, to determine whether to adopt a rule governing the utilization of exchange membership for other than public purposes.[18] Thereafter, oral hearings on the Commission's proposed rule were held at which petitioners and other interested persons presented their views directly to, and were questioned by, the Commission and its staff. On January 16, 1973, nearly five years after its inquiry began, and after receiving more than 10,000 pages of documents and at least 5,000 pages of testimony, the Commission adopted Rule 19b–2.

The Rule generally provides that membership on national securities exchanges should be made available to any person or entity committed predominantly to competing for the public's securities business.[19] An exchange member is deemed in compliance with the

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cooperative self-regulation embodied in the Securities Exchange Act was still viable. See Release, at p. 72, where the Commission stated:

"We view Section 19(b) as the specific embodiment of the philosophy of supervised self-regulation upon which much of the Securities Exchange Act has been predicated."

See, also, *Silver* v. *New York Stock Exchange*, *supra*, 373 U.S. at 352; *Merrill Lynch, Pierce, Fenner & Smith* v. *Ware*, No. 72–312, decided, December 4, 1973.

[17] The court below, in noting (Pet. App. A, p. 7) that most of the exchanges did not adopt the proposed rule, found this fact to stand in sharp contrast to petitioners' assertion (Pet., p. 5) that only the PBW was affected by, and opposed to, the Commission's Rule (Pet. App. A, p. 27).

[18] Securities Exchange Act Release No. 9716 (Aug. 3, 1972), 37 Fed. Reg. 16409 (Aug. 12, 1972).

[19] Rule 19b–2(a), Pet. App. B, p. 63.

Rule if at least 80 percent of the value of its exchange securities transactions, whether as a broker or dealer, are effected for or with persons other than the member or its affiliates,[20] or are within a class of transactions, specified in the rule, designed to contribute to the liquidity and stability of securities markets.[21]

Thus, Rule 19b–2 is designed to provide a new policy and to help establish a central market system for listed securities, which the Commission has proposed[22] and which two subcommittees of Congress[23] as well as the Department of the Treasury[24] have endorsed.

In its 195-page release announcing the adoption of Rule 19b–2, the Commission set forth detailed analyses of the background of the Rule, the regulatory objectives of the Securities Exchange Act applicable to the

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[20] *Ibid.* An affiliate of an exchange member generally is defined as any person or entity controlling, controlled by or in a control relationship with the exchange member. Rule 19b–2(b).

[21] Rule 19b–2(a)(1) through (a)(8). Pet. App. B. pp. 63–64. These types of transactions have been recognized to aid the liquidity and stability of securities markets in other contexts. See Securities Exchange Act Rule 11a–1, 17 C.F.R. 240.11a–1, and H.R. 5050, Section 205, 93d Cong., 1st Sess. (1973).

[22] See Release, *supra*, at p. 2, n. 4, and authorities cited therein. See also, *Policy Statement of the Securities and Exchange Commission on the Structure of a Central Market System* (Mar. 29, 1973).

[23] Subcommittee on Securities of the Senate Committee on Banking, Housing and Urban Affairs, 93d Cong., 1st Sess., *Report of the Securities Industry Study*, S. Doc. No. 93–13, p. 89 (1973); Subcommittee on Commerce and Finance of the House of Representatives Committee on Interstate and Foreign Commerce, 92d Cong., 2d Sess., *Report of the Securities Industry Study*, H. Rep. No. 92–1519 (1972).

[24] Department of the Treasury, *Public Policy for American Capital Markets* (Feb. 7, 1974).

Commission's action, the statutory authority for the Rule, the bases for the procedures employed in adopting the Rule, the necessity for the Rule and an analysis of competitive considerations surrounding the Rule.

Among other things, the Commission indicated that the various exchange rate, access and membership policies under study had resulted in the fragmentation of the securities markets, which in many cases precluded public investors from obtaining the best execution for their particular orders on securities traded in more than one market.[25] The Commission noted that its Rule was designed to effectuate the Commission's policy determination that competition among the various exchange markets should be fostered and based on rational factors, such as securities price, execution and other matters, rather than upon the allocation of brokerage commissions to persons other than those participating in the securities transactions.[26] It noted that essential to the central market system it is attempting to bring about is the requirement that all exchange markets be subject to certain uniform regulations, especially on the issue of exchange membership,[27] and that by adopting Rule 19b–2, it was taking the first step to create such uniformity.

ARGUMENT

The sole question decided by the court of appeals, and the only issue presented for review, is whether petitioners have a right to pre-enforcement review of

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[25] Release, *supra*, at pp. 90–108.
[26] *Id.*, at pp. 167–188.
[27] *Id.*, at p. 80, n. 251.

Rule 19b–2 in a court of appeals. Under the Administrative Procedure Act, petitioners presumably can obtain limited pre-enforcement review in a district court if they can demonstrate that the Commission's Rule "requires an immediate and significant change in the * * * [petitioners'] conduct of their affairs with serious penalties attached to noncompliance, * * *" *Abbot Laboratories* v. *Gardner*, 387 U.S. 136, 153.[28] The decision of the court of appeals correctly interprets the applicable statutory provisions respecting direct appellate judicial review and is consistent with prior decisions of this Court and other courts of appeals. There is, therefore, no occasion for review by this Court.

1. The jurisdiction of the federal courts of appeals is limited to those matters expressly prescribed by statute. See, *e.g.*, *Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541; *Central States Co.* v. *Muscatine*, 324 U.S. 138. The court below correctly held that in enacting Section 25(a) of the Securities Exchange Act of 1934, (1) Congress intended to give those courts direct appellate jurisdiction only over quasi-adjudicatory determinations of the Commission—its orders; and (2) Congress did not intend that those courts should have direct appellate review over quasi-legislative actions taken by the Commission—its rules.

Section 25(a) provides in relevant part:

> Any person aggrieved by an order issued by the Commission in a proceeding under this title to which such person is a party may obtain a review of such order in the Court of Appeals of the United States * * *

[28] The Commission does not concede that these tests could be met in this case.

In limiting this Section to review of Commission orders, as distinguished from rules and regulations, Congress was acutely aware of the distinction it was making,[29] and the legislative history of both Sections 19(b) and 25(a) emphasizes the congressional commitment to this distinction.[30]

Section 18(b) of H.R. 9323,[31] the forerunner of present Section 19(b) of the Securities Exchange Act, as originally proposed, authorized the Commission to alter, amend or modify the rules, practices or policies of registered national securities exchanges only by "rule or regulation." The debates in the House of Representatives indicate that a minority of the members of that body were opposed to this provision solely because the Commission's ability to act with respect to exchange rules was granted in quasi-legislative terms.

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[29] For example, in Section 6(a), dealing with the registration of exchanges, the data the exchanges are to set forth in their registration applications are to be prescribed by "rules and regulations," while in Section 6(c), the grant or denial of registration is to be by "order." Under Sections 11, 17 and 23(a), the Commission is authorized to act by "rules and regulations" only. Section 19(b) is the only provision of the Act, pursuant to which the Commission adopted Rule 19b-2, which accords the Commission the alternative of acting either "by rules or regulations or by order * * *."

[30] See *A. F. of L.* v. *National Labor Relations Board*, 308 U.S. 401, 408:

"We must look rather to the language of the statute, read in the light of its purpose and its legislative history, to ascertain whether the 'order' for which the review in court is provided, is contrasted with forms of administrative action differently described as a purposeful means of excluding them from the review provisions."

See also *Heikkila* v. *Barber*, 345 U.S. 229, 233; *Ludecke* v. *Watkins*, 335 U.S. 160; *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297; *Stark* v. *Wickard*, 321 U.S. 288.

[31] H.R. 9323, 73d Cong., 2d Sess., Section 18(b).

Congressman Hamilton Fish offered an amendment to strike from that section the words "rules and regulations," and substitute in their place the word "order," to insure judicial review, pursuant to Section 25(a), of Commission action under Section 19(b).[32] The proposed amendment was rejected [33] precisely because, as the court of appeals held (Pet. App. A, p. 14), the majority did not want to subject Commission rules to direct appellate review and possible modification by the court. While the Senate version of the bill originally had provided that the Commission could act only by "order" when exercising its power to require exchanges to alter, amend or modify their rules, policies and practices,[34] in conference Section 19(b) was amended to authorize the Commission to proceed by "rule or regulation or by order." [35]

At the same time that it considered the Commission's rulemaking authority with respect to regulation of exchanges, Congress also considered whether to expand the scope of the judicial review provisions of the Act. All the early drafts of this legislation, as well as the bill ultimately enacted, limited direct statutory appellate review of Commission action to Commission "orders." [36] During the Senate hearings, repre-

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[32] See 78 Cong. Rec. 8087, summarized and discussed by the court below at Pet. App. A, pp. 10–13.

[33] 78 Cong. Rec. 8093.

[34] S. 3420, 73d Cong., 2d Sess., Section 19(b).

[35] H. Rep. No. 1838, 73d Cong., 2d Sess. 37.

[36] H.R. 8720, 73d Cong., 2d Sess., Section 24; H.R. 7852, 73d Cong., 2d Sess., Section 23; H.R. 9323, 73d Cong., 2d Sess., Section 24; S. 2693, 73d Cong., 2d Sess., Section 23; S. 3420, 73d Cong., 2d Sess., Section 24.

sentatives of the New York Stock Exchange, directly concerned with the broad grant of rulemaking authority over exchange rules and practices given the Commission, suggested that what is now Section 25(a) be amended to permit direct appellate review of Commission rules and regulations as well as orders.[37] These suggestions were rejected because the Congress did not want to put the Commission "in the position of making rules and regulations for which a court may provide a substitute * * *."[38]

While the judicial review provisions of the Administrative Procedure Act may have expanded, to some extent, pre-enforcement review of administrative rulemaking,[39] they did not give the courts of appeals direct appellate jurisdiction to consider such matters. Where, as here, there is no separate statutory grant of jurisdiction authorizing appellate courts to review administrative rulemaking, to the extent judicial review is available it is available in a district court.[40]

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[37] See Hearings before the Senate Committee on Banking and Currency, on S. Res. 84 (72d Cong.), S. Res. 56 and S. Res. 97 (73d Cong.), pt. 16, pp. 7569–7572, 72d Cong., 2d Sess., and 73d Cong., 1st and 2d Sess.

[38] *Ibid.* If Commission rules were reviewable pursuant to Section 25(a), this Congressional intent would have been thwarted. Section 25(a) expressly authorizes the courts of appeals "to affirm, *modify*, and enforce or set aside [*a Commission*] *order in whole or in part*" (emphasis supplied.) Cf. *Sierra Club* v. *Morton*, 405 U.S. 727, 740.

[39] *Heikkila* v. *Barber*, 345 U.S. 229, 232–233.

[40] See, *e.g.*, *Toilet Goods Ass'n* v. *Gardner*, 387 U.S. 158, 165 n. 3; *City of Dallas* v. *Rentzel*, 172 F. 2d 122 (C.A. 5), certiorari denied, 338 U.S. 858; *Schwab* v. *Quesada*, 284 F. 2d 140 (C.A. 3); *Rettinger* v. *Federal Trade Commission*, 392 F. 2d 454 (C.A. 2); *Arizona State Dept. of Public Welfare* v. *Department of Health, Education, and Welfare*, 449 F. 2d 456, 464 (C.A. 9), certiorari denied, 405 U.S. 919.

2. In light of the plain language and legislative history of the Securities Exchange Act (discussed *supra*, pp. 10–12; Pet. App. A, pp. 10–16), the decision of the court of appeals (*id.*, at pp. 7–9)—recognizing that Congress gave the Commission a measure of procedural discretion to act by rule or by order in dealing with important regulatory problems—is neither unique nor inconsistent with applicable judicial precedent, as petitioners argue (Pet., pp. 8–10).

In *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, this Court recognized that administrative agencies, like the Commission, often can effect the same policies either through rulemaking or adjudication. Rather than finding this troublesome, as petitioners urge, this Court there reaffirmed the principle, followed by the court below, that (*id.* at 203)

> * * * the choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency.

The fact that this "discretion" may lead to different procedures and, ultimately, different modes of judicial review, was recognized in *Columbia Broadcasting System* v. *United States*, 316 U.S. 407, 421, upon which petitioners rely:

> As a matter of sound administrative practice, both the rule-making proceeding and the specific license proceeding undoubtedly have much to commend them. But they are by no means the same, nor do they necessarily give rise to the same kind of judicial review.

Petitioners' reliance on *Columbia Broadcasting*, *supra*, *Frozen Food Express* v. *United States*, 351 U.S. 40, and *Abbott Laboratories* v. *Gardner*, 387 U.S.

136, is thus misplaced. None of those cases involved the question of direct review in the court of appeals of agency regulations.[41] The issue in each was whether there could be pre-enforcement review in any court. In *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, involving the same question, the issue as to the appropriate court does not appear to have been presented. Moreover, both *Columbia Broadcasting* and *Storer* involved review of agency regulations promulgated by "orders," as required by the statutory provisions relevant to the Federal Communications Commission. This was noted in *Columbia Broadcasting, supra,* 316 U.S. at 418 (emphasis supplied):

> Such regulations have the force of law before their sanctions are invoked as well as after. *When, as here, they are promulgated by order of the Commission and* the expected conformity to them causes injury cognizable by a court of equity, they are appropriately the subject of attack under the provisions of § 402(a) and the Urgent Deficiencies Act.

The legislative history of the Securities Exchange Act demonstrates that, unlike the Federal Communications Commission (and other agencies involved in the cases cited by petitioners) whose rules must be adopted by "order," the Securities and Exchange

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[41] As this Court's opinion in *Columbia Broadcasting* makes clear, under Section 402 of the Federal Communications Act of 1934, pursuant to which review was sought, orders adopting quasi-legislative rules of the Federal Communications Commission were reviewable only in a three judge district court under the Urgent Deficiencies Act, while adjudicatory orders of the Commission were reviewable in a court of appeals. The review permitted in both *Frozen Foods Express* and *Abbott Laboratories* was in a district court.

Commission was explicitly not required to adopt its rules by "orders":

> If you are going to say that the Commission may do this by rules and regulations, that is one thing. If you are going to say that the Commission shall formulate rules and regulations *and issue them in the form of orders*, that is another thing; and every one of them could be tied up in the courts from 12 to 24 months and thus absolutely negative the very things we have done in the preceding forty-odd pages of this bill.

78 Cong. Rec. 8093 (1934) (Remarks of Rep. Rayburn, emphasis supplied). See, also, *id.* at 8090–8092. See, also, *Weinberger* v. *Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 627; *Division of Production, American Petroleum Institute* v. *Halaby*, 307 F. 2d 363 (C.A. 5).[42]

[42] In *Halaby*, the Federal Aviation Agency Administrator promulgated regulations requiring persons planning to build structures over a certain height to furnish notice. The relevant statute, similar to Section 19(b) of the Securities Exchange Act, authorized the Administrator to proceed in this area "by rules and regulations, or by order." In dismissing a petition for review of the Administrator's rules, the court of appeals held that the relevant statutory provision authorized it to review only "orders" of the Administrator and that the court therefore lacked jurisdiction to review the rules and regulations there challenged. *Id.* at 365. In response to arguments similar to those raised here by petitioners, the court in *Halaby* noted:

> "If, as contended by the petitioners, the regulations are not authorized, and result directly in irreparable injury to the petitioners and their members, there may be a remedy by original action in a federal district court in which an adequate record can be made. That was the course followed in Columbia Broadcasting System, Inc. v. United States * * *. Whether or not such a remedy is available cannot be decided

(Continued)

Contrary to petitioners' assertion, the decision of the court of appeals is not in conflict with decisions of the Court of Appeals for the District of Columbia Circuit. In *Philadelphia Company* v. *Securities and Exchange Commission*, 164 F. 2d 889 (C.A.D.C.), certiorari denied, 333 U.S. 828, the court held that a Commission directive, denominated a rule, was in fact an adjudicatory order applicable to a single holding company system and therefore reviewable. As noted at pp. 17–18, *infra*, here the court of appeals held Rule 19b–2 to be a quasi-legislative rule of general application.[42]

While the District of Columbia Circuit authorized pre-enforcement review in the court of appeals in *Deutsche Lufthansa Aktiengesellschaft* v. *Civil Aeronautics Board*, 479 F. 2d 912 and *City of Chicago* v. *Federal Power Commission*, 458 F. 2d 731, certiorari denied, 405 U.S. 1074, in both cases the court limited its holding to situations where there was an unambiguous concession by petitioners that there was no factual dispute and the only issues were questions of law.[43] In contrast to those cases, here petitioners raise a number of factual

(Continued)

in the present proceeding. We hold only that there is no right of direct review in this Court * * *. The petition is dismissed for lack of jurisdiction."

Id. at 365–366.

[43] The court of appeals noted (Pet. App. A. p. 28, n. 15):

"Of course, if a court were confronted with a situation in which the Commission attempted to cloak clearly quasi-judicial action in quasi-legislative garb, different factors might militate in favor of this court's review. We are not faced with such a situation in the instant case."

[41] To the extent that *Medical Committee for Human Rights* v. *Securities and Exchange Commission*, 432 F. 2d 659 (C.A.D.C.), vacated as moot, 404 U.S. 403, has any continuing viability, it

(Continued)

issues, including whether Rule 19b–2 is directed solely at them (Pet., pp. 3–6).[45]

3. The court of appeals concluded (Pet. App. A, p. 28) that Rule 19b–2 was a rule because it (1) "applies to all members of all exchanges, not just to PBW and its members"; (2) "provides specific standards to regulate the future membership practices of the exchanges rather than focusing on the past practices of any particular exchange"; and (3) is "prospective [in] application and applicable across the board * * *." In so ruling, the court below properly adhered to the distinction between rules and orders enunciated by this Court as long ago as 1908 and as

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supports, rather than conflicts with, the decision of the court below. The agency action there involved did not purport to be a rule or regulation; it involved the Commission's approval of a staff "no action" position which the court of appeals determined was final agency action that adjudicated rights of the petitioner in that case and was therefore reviewable under Section 25(a) of the Securities Exchange Act. Similarly, *Independent Broker-Dealers' Trade Association* v. *Securities and Exchange Commission*, 442 F. 2d 132, 143, (C.A.D.C.) certiorari denied, 404 U.S. 828, stated that "limited judicial" review of the action taken by the Commission in that case could be had only in a district court, not in a court of appeals, since "Section 25(a) applies in terms only to 'orders,' a narrower concept than that of 'agency action' reviewable in district courts * * *." The district court had dismissed the attempt to review the Commission's action on the ground that the plaintiff did not have standing; the dismissal was vacated, but the case was remanded with instructions that a summary judgment on behalf of the Commission be entered because the review sought went beyond the questions of the Commission's "power to act" and "elemental fairness." 442 F. 2d at 143.

[45] While the court below disputed this assertion (Pet. App. A, p. 28), it noted that:

"Such questions are better resolved by a forum whose function is fact-finding, a function which the court of appeals in the first instance is singularly ill-equipped to perform."

recently as last year. As this Court consistently has recognized with respect to the functions of administrative agencies:

> A judicial inquiry investigates, declares and enforces liabilities as they stand on present and past facts and under laws supposed already to exist. That is its purpose and end. Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power.[46]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

LAWRENCE E. NERHEIM,
General Counsel,
DAVID FERBER,
Solicitor,
HARVEY L. PITT,
Special Counsel,
MARTIN S. BERGLAS,
Attorney,
Securities and Exchange Commission.

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[46] *Prentis* v. *Atlantic Coast Line Co.*, 211 U.S. 210, 226. Cf. *Bi-Metallic Investment Co.* v. *State Board of Equalization*, 239 U.S. 441, 445–446; Attorney General, *Manual on the Administrative Procedure Act* 14 (1947); 5 U.S.C. 551(5) and 551(6); *United States* v. *Florida East Coast Railway*, 410 U.S. 224, 245–246.

Accord, *Columbia Broadcasting System, supra; American Airlines, Inc.* v. *Civil Aeronautics Board*, 359 F. 2d 624, 629–630 (C.A. D.C.) (*en banc*), certiorari denied, 385 U.S. 843; *Air Line Pilots Ass'n* v. *Quesada*, 276 F. 2d 892, 895–896 (C.A. 2); *Willapoint Oysters, Inc.* v. *Ewing*, 174 F. 2d 676, 693–694 (C.A. 9).

APPENDIX

THE SECURITIES EXCHANGE ACT OF 1934, 48 STAT. 881, AS AMENDED, 15 U.S.C., 78a *et seq.*:

Section 2, 15 U.S.C. 78b:

For the reasons hereinafter enumerated, transactions in securities as commonly conducted upon securities exchanges and over-the-counter markets are affected with a national public interest which makes it necessary to provide for regulation and control of such transactions and of practices and matters related thereto, including transactions by officers, directors, and principal security holders, to require appropriate reports, and to impose requirements necessary to make such regulation and control reasonably complete and effective, in order to protect interstate commerce, the national credit, the Federal taxing power, to protect and make more effective the national banking system and Federal Reserve System, and to insure the maintenance of fair and honest markets in such transactions:

(1) Such transactions (a) are carried on in large volume by the public generally and in large part originate outside the States in which the exchanges and over-the-counter markets are located and/or are effected by means of the mails and instrumentalities of interstate commerce; (b) constitute an important part of the current of interstate commerce; (c) involve in large part the securities of issuers engaged in interstate commerce; (d) involve the use of credit, directly affect the financing of trade, industry, and transportation in interstate commerce, and directly affect and influence the volume of interstate commerce; and affect the national credit.

(2) The prices established and offered in such transactions are generally disseminated and quoted throughout the United States and foreign countries and constitute a basis for determining and establishing the prices at which securities are bought and sold, the amount of certain taxes owing to the United States and to the several States by owners, buyers, and sellers of securities, and the value of collateral for bank loans.

(3) Frequently the prices of securities on such exchanges and markets are susceptible to manipulation and control, and the dissemination of such prices gives rise to excessive speculation, resulting in sudden and unreasonable fluctuations in the prices of securities which (a) cause alternately unreasonable expansion and unreasonable contraction of the volume of credit available for trade, transportation, and industry in interstate commerce, (b) hinder the proper appraisal of the value of securities and thus prevent a fair calculation of taxes owing to the United States and to the several States by owners, buyers, and sellers of securities, and (c) prevent the fair valuation of collateral for bank loans and/or obstruct the effective operation of the national banking system and Federal Reserve System.

(4) National emergencies, which produce widespread unemployment and the dislocation of trade, transportation, and industry, and which burden interstate commerce and adversely affect the general welfare, are precipitated, intensified, and prolonged by manipulation and sudden and unreasonable fluctuations of security prices and by excessive speculation on such exchanges and markets, and to meet such emergencies the Federal Government is put to such great expense as to burden the national credit.

Section 6, 15 U.S.C. 78f:

(a) Any exchange may be registered with the Commission as a national securities exchange under the terms and conditions hereinafter provided in this section, by filing a registration statement in such form as the Commission may prescribe, containing the agreements, setting forth the information, and accompanied by the documents, below specified:

(1) An agreement (which shall not be construed as a waiver of any constitutional right or any right to contest the validity of any rule or regulation) to comply, and to enforce so far as is within its powers compliance by its members, with the provisions of this title, and any amendment thereto and any rule or regulation made or to be made thereunder;

(2) Such data as to its organization, rules or procedure, and membership, and such other information as the Commission may by rules and regulations require as being necessary or appropriate in the public interest or for the protection of investors;

(3) Copies of its constitution, articles of incorporation with all amendments thereto, and of its existing bylaws or rules or instruments corresponding thereto, whatever the name, which are hereinafter collectively referred to as the "rules of the exchange"; and

(4) An agreement to furnish to the Commission copies of any amendments to the rules of the exchange forthwith upon their adoption.

(b) No registration shall be granted or remain in force unless the rules of the exchange include provision for the expulsion, suspension, or disciplining of a member for conduct or proceeding inconsistent with just and equitable principles of trade, and declare that the willful violation of any provisions of this title or any rule or regulation thereunder shall be considered conduct or proceeding inconsistent with just and equitable principles of trade.

(c) Nothing in this title shall be construed to prevent any exchange from adopting and enforcing any rule not inconsistent with this title and the rules and regulations thereunder and the applicable laws of the State in which it is located.

(d) If it appears to the Commission that the exchange applying for registration is so organized as to be able to comply with the provisions of this title and the rules and regulations thereunder and that the rules of the exchange are just and adequate to insure fair dealing and to protect investors, the Commission shall cause such exchange to be registered as a national securities exchange.

(e) Within thirty days after the filing of the application, the Commission shall enter an order either granting or, after appropriate notice and opportunity for hearing, denying registration as a national securities exchange, unless the exchange applying for registration shall withdraw its application or consent to the Commission's deferring action on its application for a stated longer period after the date of filing. The filing with the Commission of an application for registration by an exchange shall be deemed to have taken place upon the receipt thereof. Amendments to an application may be made upon such terms as the Commission may prescribe.

(f) An exchange may, upon appropriate application in accordance with the rules and regulations of the Commission, and upon such terms as the Commission may deem necessary for the protection of investors, withdraw its registration.

Section 11, 15 U.S.C. 78k:

(a) The Commission shall prescribe such rules and regulations as it deems necessary or appropriate in the public interest or for the protection of investors, (1) to regulate or prevent floor trading by members of national securities exchanges, directly or indirectly for their own

account or for discretionary accounts, and (2) to prevent such excessive trading on the exchange but off the floor by members, directly or indirectly for their own account, as the Commission may deem detrimental to the maintenance of a fair and orderly market. It shall be unlawful for a member to effect any transaction in a security in contravention of such rules and regulations, but such rules and regulations may make such exemptions for arbitrage transactions, for transactions in exempted securities, and, within the limitations of subsection (b) of this section, for transactions by odd-lot dealers and specialists, as the Commission may deem necessary or appropriate in the public interest or for the protection of investors.

(b) When not in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, the rules of a national securities exchange may permit (1) a member to be registered as an odd-lot dealer and as such to buy and sell for his own account so far as may be reasonably necessary to carry on such odd-lot transactions, and/or (2) a member to be registered as a specialist. If under the rules and regulations of the Commission a specialist is permitted to act as a dealer, or is limited to acting as a dealer, such rules and regulations shall restrict his dealings so far as practicable to those reasonably necessary to permit him to maintain a fair and orderly market, and/or to those necessary to permit him to act as an odd-lot dealer if the rules of the exchange permit him to act as an odd-lot dealer. It shall be unlawful for a specialist or an official of the exchange to disclose information in regard to orders placed with such specialist which is not available to all members of the exchange, to any person other than an official of the exchange, a representative of the Commission, or a specialist

who may be acting for such specialist: but the Commission shall have power to require disclosure to all members of the exchange of all orders placed with specialists, under such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors. It shall also be unlawful for a specialist acting as a broker to effect on the exchange any transaction except upon a market or limited price order.

(c) If because of the limited volume of transactions effected on an exchange, it is in the opinion of the Commission impracticable and not necessary or appropriate in the public interest or for the protection of investors to apply any of the foregoing provisions of this section or the rules and regulations thereunder, the Commission shall have power, upon application of the exchange and on a showing that the rules of such exchange are otherwise adequate for the protection of investors, to exempt such exchange and its members from any such provision or rules and regulations.

(d) It shall be unlawful for a member of a national securities exchange who is both a dealer and a broker, or for any person who both as a broker and a dealer transacts a business in securities through the medium of a member or otherwise, to effect through the use of any facility of a national securities exchange or of the mails or of any means or instrumentality of interstate commerce, or otherwise in the case of a member, (1) any transaction in connection with which, directly or indirectly, he extends or maintains or arranges for the extension or maintenance of credit to or for a customer on any security (other than an exempted security) which was a part of a new issue in the distribution of which he participated as a member of a selling syndicate or group within thirty days prior to such transaction: *Provided,* That credit

shall not be deemed extended by reason of a bona fide delayed delivery of any such security against full payment of the entire purchase price thereof upon such delivery within thirty-five days after such purchase, or (2) any transaction with respect to any security (other than an exempted security) unless, if the transaction is with a customer, he discloses to such customer in writing at or before the completion of the transaction whether he is acting as a dealer for his own account, as a broker for such customer, or as a broker for some other person.

(e) The Commission is directed to make a study of the feasibility and advisability of the complete segregation of the functions of dealer and broker, and to report the results of its study and its recommendations to the Congress on or before January 3, 1936.

Section 17(a), 15 U.S.C. 78q(a):

Every national securities exchange, every member thereof, every broker or dealer who transacts a business in securities through the medium of any such member, every registered securities association, and every broker or dealer registered pursuant to section 15 of this title, shall make, keep, and preserve for such periods, such accounts, correspondence, memoranda, papers, books, and other records, and make such reports, as the Commission by its rules and regulations may prescribe as necessary or appropriate in the public interest or for the protection of investors. Such accounts, correspondence, memoranda, papers, books, and other records shall be subject at any time or from time to time to such reasonable periodic, special, or other examinations by examiners or other representatives of the Commission as the Commission may deem necessary or appropriate in the public interest or for the protection of investors.

Section 23(a), 15 U.S.C. 78w(a):

> The Commission and the Board of Governors of the Federal Reserve System shall each have power to make such rules and regulations as may be necessary for the execution of the functions vested in them by this title, and may for such purpose classify issuers, securities, exchanges, and other persons or matters within their respective jurisdictions. No provision of this title imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule or regulation of the Commission or the Board of Governors of the Federal Reserve System, notwithstanding that such rule or regulation may, after such act or omission, be amended or rescinded or be determined by judicial or other authority to be invalid for any reason.

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